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APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1968

No. 830

CAPTAIN DALE E. NOYD,

Petitioner,

—v.—

MAJOR GENERAL CHARLES R. BOND, JR., Commander, Twelfth Air Force, United States Air Force; COLONEL GEORGE R. DOERR, Commander, 832nd Combat Support Group, and Commander, Cannon Air Force Base, New Mexico; COLONEL ROBERT R. SCOTT, Commander, 832nd Air Division, Cannon Air Force Base, New Mexico; COLONEL JIMMY J. JUMPER, Commander, 27th Tactical Fighter Wing, Cannon Air Force Base, New Mexico; LIEUTENANT COLONEL JAMES L. GLESSNER, JR., Commander, 524th Tactical Fighter Squadron, Cannon Air Force Base, New Mexico; CAPTAIN CHARLES THOMPSON, Commander, 832nd Security Police Squadron, Cannon Air Force Base, New Mexico,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 13, 1968

CERTIORARI GRANTED JANUARY 20, 1969

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Docket Entries

1968

May 16 Filing Petition for Writ of Habeas Corpus. JS 5

May 16 Filing and entering Order to Show Cause, that respondents show cause why a writ of habeas corpus should not issue, on May 23, 1968 at 10:00 a. m.; that petitioner be continued in his present custody; that petition be brought to Albuquerque at the above date; that service of this order together with a copy of the verified petition and exhibits, on the U. S. Attorney, on respondent Colonel George R. Doerr, on or before May 20, 1968; that service be made upon the Attorney General of the United States forthwith. (Payne).

May 23 At Albuquerque, Judge Payne in open court, Sid Morrish, acting reporter. Called at 10:00 AM for Hearing on Order to Show Cause. APPEARANCES: Mr. Karpatkin, Mr. Phillips & Mr. Kitts for Petitioner who was present in court. Mr. Quinn, Miss Streeter and Lt. Col. Barrett (admitted on motion of Mr. Quinn for this hearing) for Respondent. Arguments had to the Court. Court announces its ruling as will appear in reporters record. Order to be entered by the court ruling this court has Jurisdiction and Staying the Execution of sentence imposed imposed by the Military. The Court will issue written Finding of Fact and Conclusions of Law. At request of Mr. Karpatkin, the court orders from the bench, pending written order that execution be stayed pending appeal.

May 23 Filing Notice of Appeal by petitioner. Copy delivered to U. S. Attorney.

May 24 Filing and entering Decision and Order confining petitioner to Fort Leavenworth constitutes execution of his sentence and is void, and the Court has no jurisdiction or authority to interfere with the discretion of the military establishment concerning petitioner's custody, so long as such discretion is exercised within the framework of the Uniform Code of Military Justice, and relieving petitioner from the order requiring him to go to the disciplinary barracks at Fort Leavenworth, Kansas. (Payne)

May 27 Filing Bond on Appeal secured by cash deposit.

May 27 Filing Notice of Appeal.

Petition for Writ of Habeas Corpus

[Filed May 16, 1968]

UNITED STATES DISTRICT COURT

District of New Mexico

Civil Action No. 7560

Captain Dale E. Noyd,

Petitioner,

—v.—

Major General Charles R. Bond, Jr., Commander, Twelfth Air Force, United States Air Force; Colonel George R. Doerr, Commander, 832nd Combat Support Group, and Commander, Cannon Air Force Base, New Mexico; Colonel Robert R. Scott, Commander, 832nd Air Division, Cannon Air Force Base, New Mexico; Colonel Jimmy J. Jumper, Commander, 27th Tactical Fighter Wing, Cannon Air Force Base, New Mexico; Lieutenant Colonel James L. Glessner, Jr., Commander, 524th Tactical Fighter Squadron, Cannon Air Force Base, New Mexico; Captain Charles Thompson, Commander, 832nd Security Police Squadron, Cannon Air Force Base, New Mexico,

Respondents.

To The Honorable United States District Court for the District of New Mexico:

The petition of Captain Dale E. Noyd respectfully shows:

1. Petitioner makes application herein for a writ of habeas corpus in that he is unlawfully detained and re-

strained of his liberty by and under the authority of the respondents at Cannon Air Force Base, Clovis, New Mexico, in this District.

2. Petitioner is a regular commissioned officer in the United States Air Force, assigned to the 524th Tactical Fighter Squadron, which is part of the 27th Tactical Fighter Wing, which in turn is part of the 832nd Air Division, all of which are stationed at Cannon Air Force Base, New Mexico.

3. Petitioner has been in confinement at Cannon Air Force Base, New Mexico since March 9, 1968. The place of his confinement is his quarters, at No. 1651a, Cannon Air Force Base, Clovis, New Mexico. Petitioner has been so confined since such date, in the status of arrest in quarters.

4. The cause of such confinement and detention is a judgment of conviction rendered on March 8, 1968 by a general court martial for violation of Article 90 of the Uniform Code of Military Justice. Article 90 deals with willful violations of a lawful order. The charge and specification are as follows:

"CHARGE: Violation of the Uniform Code of Military Justice, Article 90.

"SPECIFICATION: In that CAPTAIN DALE E. NOYD, United States Air Force, 524th Tactical Fighter Squadron, 27th Tactical Fighter Wing, Cannon Air Force Base, New Mexico, having received a lawful command from Colonel Homer K. Hansen, his superior officer, 'To perform duties as instructor pilot tomorrow, 5 December

1967, as scheduled,' did, at Cannon Air Force Base, New Mexico, on or about 5 December 1967, willfully disobey the same."

On March 9, 1968, said general court martial sentenced petitioner to dismissal from the service, forfeiture of all pay and allowances, and one year of confinement at hard labor.

5. The respondents are as follows:

(a) The respondent, General Bond, is the Commander of the 12th Air Force who ordered that a general court martial be convened for the purpose of trying petitioner for an act of alleged willful disobedience of a lawful order. Such respondent, on May 10, 1968, approved of the findings and sentence of such general court martial and has directed that petitioner be transferred to the United States Disciplinary Barracks at Fort Leavenworth, Kansas. On information and belief, such transfer is to be effected on May 20, 1968, unless there is a contrary order by this Court.

(b) The respondent, Colonel Doerr, in his capacity as Base Commander at Cannon Air Force Base, ordered that petitioner be confined in arrest in quarters following his sentence on March 9, 1968. Pursuant to such confinement order, petitioner is compelled to remain in his quarters at all times, and may not leave for any reason except with the permission of such respondent, or in the event of emergency.

(c) The respondents, Colonel Scott, Colonel Jumper and Lieutenant Colonel Glessner are, respectively, petitioner's Division Commander, Wing Commander and Squadron Commander.

(d) The respondent, Captain Thompson, as Commander of the Security Police at Cannon Air Force Base, is the officer in charge of supervising the detention and arrest of petitioner. On information and belief, such respondent, and his predecessor, have, pursuant to orders issued by the respondent Colonel Doerr, caused continued surveillance to be instituted and maintained over petitioner's detention, including, without limitation, inspection visits two times each day by Security Police personnel.

6. The events which resulted in petitioner's court martial, conviction and imprisonment are set forth in a petition for a writ of certiorari which petitioner filed in the United States Supreme Court in the case of *Noyd* v. *McNamara, et al.*, Oct. Term 1967, No. 722 (Exhibit "A" hereto), and particularly in the "Statement of the Case" on pages 7-20 thereof. These events commenced with petitioner's making application for recognition as a conscientious objector late in the fall of 1966, pursuant to appropriate statutes and Air Force Regulation 35-24. At such time petitioner, who had eleven years of honorable service, including a tour of duty as a fighter pilot in England, was assigned as Assistant Professor of Psychology at the United States Air Force Academy, Colorado Springs, Colorado. Such application was denied by the Air Force on grounds which petitioner claims were unlawful and unconstitutional, because his religious beliefs were not those of universal pacifism, and in a manner which violated the procedure dictated by the regulations, and was otherwise in violation of petitioner's constitutional rights. (See Exhibit "A", p. 3, "Statement of Questions Presented", and pp. 20-42, *passim*.)

7. Following such denial, petitioner was ordered transferred from the United States Air Force Academy to Cannon Air Force Base. Prior to such transfer, on March 27, 1967, petitioner instituted an action in the United States District Court for the District of Colorado for the purpose of seeking judicial relief from a combat or combat-related assignment, which would be in violation of his conscience. On March 29, 1967 Hon. William E. Doyle, United States District Judge, granted a preliminary injunction

> "against assigning the plaintiff to combat activity or requiring him to perform duties whereby he will be perhaps faced with the necessity of a general court martial or other proceedings which might injure him as a practical matter."
>
> *Noyd* v. *McNamara,* —— F. Supp. —— (Exhibit "A", pp. 1a-3a).

After a full trial, Judge Doyle ruled that the Federal Court did not have jurisdiction because of the failure to exhaust military remedies, and consequently, dismissed the complaint and dissolved the injunction. Judge Doyle wrote:

> "We do not reach the merits of plaintiff's case and hence we do not deny his sincerity or review his particular basis for claiming that he is a conscientious objector."
>
> 267 F. Supp. 708 (Exhibit "A", p. 18a).

8. The decision of the District Court was appealed to the United States Court of Appeals for the Tenth Circuit. Such court affirmed the dismissal on grounds of lack of jurisdiction. The Tenth Circuit pointed out that it could

not anticipate that petitioner will be denied "a full consideration of his constitutional rights within the complete scope of that [military] process." 378 F. 2d 538 (Exhibit "A", p. 21a).

9. A petition for certiorari (Exhibit "A" hereto) was filed in the United States Supreme Court and denied on December 18, 1967, Mr. Justice Douglas dissenting. In the Solicitor General's memorandum for the United States in opposition to the petition for certiorari, it was urged that the civilian courts should not intervene, since petitioner would have a full opportunity to present his constitutional defenses within the military process. The Solicitor General wrote:

> "if and when petitioner is actually confronted with an order and charged with disobedience of it, he will have an opportunity to present his defenses within the traditional framework of court martial procedures, review boards, resort to the service Secretary, and request for relief from the Court of Military Appeals. If his contentions fail, and if they relate to fundamental rights, it would then be appropriate to test them in the civil courts by a petition for habeas corpus."
>
> *Noyd* v. *McNamara,* Sup. Ct. of U.S., Oct. Term 1967, No. 722, Solicitor General's Memorandum in Opposition, p. 4.

The Solicitor General added that all of petitioner's constitutional issues "can be readily decided in a single court martial proceeding" (Memorandum, p. 7).

10. Thus, petitioner proceeded through all of the civilian court channels available in an attempt to secure relief in

some less drastic fashion than by disobeying an order and facing a court martial. At each stage, however, petitioner's contentions were greeted with jurisdictional objections accompanied by repeated assurances that he would be able to raise all of his constitutional defenses in a court martial, including, specifically, the defense of wrongful denial of his application for classification as a conscientious objector.

11. On December 5, 1967, the inevitable confrontation occurred, as a result of which petitioner was charged with the violation of Article 90, which led to his court martial, his conviction, and his present incarceration.

12. Notwithstanding these assurances, at the ensuing court martial, petitioner's attempts to raise these defenses were frustrated. As is set forth in assignments No. 13 through No. 17 in the Assignments of Error attached hereto (Exhibit "B"), and as can be seen from a review of the trial record which will be available for perusal by this Court, all of petitioner's efforts to raise these constitutional defenses were rejected by the Law Officer, and were never considered by the court.

13. The principal legal question which petitioner has thus far not had a hearing on in any forum—save for the initial decision by Judge Doyle granting a preliminary injunction—is whether or not he is disqualified from classification as a conscientious objector because his religious views are not those of universal pacifism. It is clear that the Secretary of the Air Force and other senior Air Force officers who rendered the final decision on petitioner's application denied his application on the grounds that he failed to qualify because he was not a universal pacifist.

This was readily admitted by the Solicitor General in the Supreme Court of the United States:

> "The Air Force's denial of petitioner's claim to conscientious objector status was based on his own statements regarding the types of war to which he objects, and there is no indication that the Air Force relied on any other evidence."
>
> Memorandum in Opposition, p. 10.

14. By reason of the foregoing, petitioner has thus far been denied his day in court on this vital constitutional question, affecting his constitutional right of religious liberty, and likewise his personal freedom. There has not yet been any judicial review of whether or not the Secretary had the legal authority to deny petitioner's claim for this reason. Obviously, if the Secretary denied the claim for an unlawful reason, any subsequent order petitioner received could not be a lawful order. This was the argument which petitioner attempted to advance in the court martial, but the Law Officer refused to consider the argument that wrongful denial of conscientious objector status was a defense to a prosecution for disobedience.

15. In addition to the foregoing, there were numerous additional errors of law committed in the course of the court martial, any one or more of which may well result in reversal on appeal. See Exhibit "B", *passim*.

16. The normal appellate procedures provided following a conviction by general court martial include appeal to a Board of Review within the Air Force; petition for certiorari to the United States Court of Military Appeals; and if certiorari is granted, review on the merits by the

Court of Military Appeals. Petitioner has been advised by counsel, including assigned appellate defense counsel from the Office of the Judge Advocate General of the Air Force, that this appellate process is not likely to be completed by the end of 1968, if indeed it can be completed by then.

17. Petitioner's one-year sentence began to be served on March 9, 1968. Petitioner is informed that with time off for good behavior it is possible that his imposed sentence of one year could be fully served in fact within ten months or less. Under the circumstances, petitioner's continued detention may well result in an appellate reversal after he has served out most, if not all, of his sentence.

18. Petitioner's continued confinement is therefore unlawful and unconstitutional and may well cause irreparable injury if his conviction is reversed on appeal because of one or more errors of law.

19. *A fortiori,* the execution of his anticipated transfer to the United States Disciplinary Barracks at Fort Leavenworth, which is, on information and belief, the ultimate in high security penal institutions, to which the most severe military criminal convicts are sent, will magnify immeasurably such irreparable injury.

20. On the other hand, petitioner's release from confinement, or, in the alternative, the maintenance of present conditions of confinement until the completion of appellate review will endanger neither person nor property nor any lawful interest of the United States Air Force.

21. On April 22, 1968, petitioner's counsel appeared before Colonel Thomas W. Isbell, Staff Judge Advocate and

legal advisor to the respondent General Bond, and certain members of Colonel Isbell's staff. At such occasion, Assignments of Error in Behalf of the Accused, a copy of which is attached hereto (Exhibit "B") were presented. Likewise at such occasion, an application was made to the convening authority, the respondent General Bond, for either release on bail or continuation of the present conditions of confinement, pending completion of appellate review. By the action of the convening authority in approving the findings and sentence and in ordering the transfer of petitioner to Fort Leavenworth, such request has been denied.

22. Petitioner is informed, and believes, on the basis of inquiries made and information obtained by counsel, that any similar requests made to higher military authorities, including to the Office of the Secretary of the Air Force, will be referred to the respondent General Bond. Consequently, since the respondent General Bond has previously denied such request, petitioner has, on information and belief, exhausted all effective military remedies.

23. Petitioner's continued confinement is illegal and unconstitutional for the following reasons:

(a) Because of the many grave errors of law made prior to and in the course of the general court martial, including specifically, the erroneous refusal to allow petitioner to attempt to prove the illegality of the order, by demonstrating that his claim for conscientious objector classification was improperly denied, such conviction bears a strong likelihood of reversal either in the military appellate courts, or, if necessary, in subsequent proceedings in the Federal Courts.

Consequently, incarceration pending appeal is arbitrary, capricious and without due process of law.

(b) Without limitation of the foregoing, petitioner, who was in effect directed by the Federal Courts and advised by the Solicitor General of the United States to raise his defenses in a military tribunal, was denied the right by the military tribunal to raise such defenses. Keeping him in confinement until some authoritative military or civil tribunal considers and adjudicates the merits is uniquely cruel, frustrating, unjust and a deprivation of liberty without due process of law.

(c) It is in violation of paragraph 21(d) of the Manual for Courts Martial, which provides for the restraint of a person tried and convicted by court martial and allows "the immediate release of the person from any restraint, or the imposition of any necessary restraint pending final action on the case." No restraint is necessary in this case.

(d) It is in violation of the due process clause of the Fifth Amendment, and the excessive bail provision of the Eighth Amendment, as well as the religious liberty clause of the First Amendment, for the petitioner to continue to be confined under these circumstances.

23. No prior application has been made for the relief sought herein.

WHEREFORE, petitioner prays for the following relief:

(i) that a writ of habeas corpus issue herein, directed to the respondents, commanding them to produce the body of the petitioner, Captain Dale E. Noyd, before this Court at a time and place to be specified in such writ, to the end that

this Court may inquire into the cause of petitioner's detention, and commanding respondents not to transfer the petitioner to any other place or condition of confinement, pending full hearing and determination of this application and any appeals therefrom;

(ii) that after a full and complete hearing, this Court issue an order:

(A). that petitioner be ordered discharged from the detention and restraint aforesaid, and reassigned to duties not in conflict with his conscientious beliefs, or, in the alternative,

(B) that petitioner be released on reasonable bail, or parole, or on his own recognizance, and either placed on leave or assigned to duties not in conflict with his conscientious beliefs, pending the completion of appellate review, or, in the alternative,

(C) that this Court order that the petitioner be retained in his present condition of confinement and not be transferred to the United States Disciplinary Barracks at Fort Leavenworth, Kansas, or to any other place, pending the completion of appellate review, and

(iii) for such other and further relief as may be just and proper.

Dated: May 15, 1968.

CAPTAIN DALE E. NOYD, *Petitioner*,

By /s/ MARVIN M. KARPATKIN
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[Verified on May 15, 1968]

Decision and Order of the District Court

[Filed May 24, 1968]

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

No. 7560 Civil

CAPTAIN DALE E. NOYD,

Petitioner,

v.

MAJOR GENERAL CHARLES R. BOND., JR., Commander, Twelfth Air Force, United States Air Force, *et al.*,

Respondents.

This cause came on for hearing on the 23rd day of May, 1968, at 10:00 a.m., on an Order to Show Cause issued by this Court on May 16, 1968, requiring the respondents to show cause why a writ of habeas corpus should not issue herein as prayed for in the petition. The petitioner was present in person and by his attorneys. The petitioner was represented by Marvin M. Karpatkin and other attorneys. The respondents were represented by the Honorable John Quinn, United States Attorney, and others. No testimony was taken, but each side argued the case at length. Since no opposing testimony was offered, the Court took the petition to be true, and this opinion is based upon such facts.

It may be noted at the outset that the function of a Federal District Court in a case such as this is not to re-

evaluate the evidence and make a determination of the petitioner's guilt or innocence. The extent to which this Court should inquire into this matter has been defined by the Tenth Circuit as follows:

> "(1) The scope of judicial review of military habeas corpus cases is well established. Court inquiry is limited to whether the court-martial had jurisdiction of the person and the offense charged, whether the accused was accorded due process of law as contemplated and assured by the Uniform Code of Military Justice, and whether competent military tribunals gave fair and full consideration to all the procedural safeguards deemed essential to a fair trial under military law."

Gorko v. *Commanding Officer,* 314 F. 2d 858 (1963). In *Kennedy* v. *Commandant,* 377 F. 2d 339, the same court, speaking through Chief Judge Murrah, reiterated the above expressed formula.

The facts presented by this case are as follows: Petitioner was convicted by a general court-martial for violation of Article 90 of the Uniform Code of Military Justice for a willful violation of a lawful order. This conviction occurred at Cannon Air Force Base near Clovis, New Mexico, and the judgment of the conviction was rendered on March 8, 1968. The petitioner was sentenced to dismissal from the service, forfeiture of all pay and allowances, and one year of confinement at hard labor, and on May 10, 1968, General Bond approved the findings and sentence of such general court-martial and directed that the petitioner be transferred to the United States Disciplinary Barracks at Fort Leavenworth, Kansas.

Article 71(c) of the Uniform Code of Military Justice (10 U. S. C. §871(c)) reads as follows:

"(c) No sentence which includes, unsuspended, a dishonorable or bad-conduct discharge, or confinement for one year or more, may be executed until affirmed by a board of review and, in cases reviewed by it, the Court of Military Appeals."

There is a disagreement as to whether petitioner's incarceration at Fort Leavenworth would be for the sole purpose of safekeeping, or whether it would be considered execution of his sentence. It is the opinion of the Court that placing the petitioner in Fort Leavenworth would, in effect, constitute, in part at least, execution of the sentence. Petitioner's sentence includes a term of confinement for one year, and the Court holds that the respondents cannot execute such sentence until such review procedures as are mentioned in Article 71(c) are completed.

Respondents contend that Article 57 of the Uniform Code of Military Justice (10 U. S. C. §857), specifically subsection (b), which provides that "any period of confinement included in a sentence of a court-martial begins to run from the date the sentence is adjudged by the court-martial . . .", permits or requires confinement of petitioner in the manner attempted. The Court disagrees with this contention. Article 57 is of a general nature, and it seems to the Court that Article 71 creates specific exceptions to the application of Article 57. Furthermore, if these sections are indeed, to some degree incompatible, the Court believes that any such conflict should be resolved in the petitioner's favor.

The Court has concluded that it has no jurisdiction to tell the respondents what conditions of restraint may be imposed upon the petitioner, or what conditions of release, if any, might be imposed. The Bail Reform Act of 1966 specifically excludes offenses of the type involved here

from the jurisdiction of the district courts. The case of *Levy* v. *Resor, et al.*, 17 U. S. C. M. A. 135, 37 C. M. R. 99, holds that the right of a person in the military service to bail pending appeal from conviction is not constitutional, but statutory only, and that, in the military, there is no statutory provision for such bail. This Court agrees with that decision, and concludes that it has no right to say what bail, if any, should be set for the petitioner, nor to state what conditions of release, if any, should be imposed. Those are matters that are properly within the discretion of the military authority, and it may be that the appropriate officials will feel that the petitioner should be confined during the review procedures. This Court is not attempting to rule on any of those questions. The Court merely holds that sending the petitioner to Fort Leavenworth would, in effect, amount to execution of the sentence.

It has traditionally been held that a writ of habeas corpus is unavailable to question a sentence to be served in the future. In *Rowe* v. *Peyton*, 383 F. 2d 709 (4th Cir., 1967), however, the Fourth Circuit observed that since *McNally* v. *Hill*, 293 U. S. 131, the Supreme Court has adopted a more liberal, less technical concept of the writ, and the Court concluded that a writ might be granted concerning a sentence to be served in the future.

The Fourth Circuit in *Rowe* felt that the Federal habeas corpus writ was available "to serve the clearly present need of a procedural device to test the legality of these convictions (which involved sentences to be served in the future) . . . ." 383 F. 2d 709, 710.

The petitioner in the present case has not yet been incarcerated at Fort Leavenworth; however, an order has been issued requiring him to go there, and the Court be-

lieves that a present need exists to test the legality of such order.

An important question raised by this proceeding is whether this action is premature in view of the fact that the petitioner has not exhausted his military remedies. The Court is familiar with the exhaustion principle, and the wording of the judicial code which codifies this principle, 28 U. S. C. A. §2254. "The policy underlying that rule is as pertinent to the collateral attack of military judgments as it is to collateral attack of judgments rendered in state courts." *Gusik* v. *Schilder,* 340 U. S. 128, 131, 132.

It is the Court's opinion that the circumstances present here are such as to render the military remedy process ineffective to protect the petitioner's rights. In view of the determination on the part of the Air Force to execute petitioner's sentence before completion of the prerequisites to execution of sentence provided by Article 71(c), U. C. M. J., the Court has concluded that the circumstances warrant a partial granting of the writ requested notwithstanding petitioner's failure at this point to have exhausted his military remedies. 28 U. S. C. A. §2254(b). To require petitioner to await completion of the appellate review process would be to permit execution of his sentence. Such would constitute a deprivation of petitioner's rights under the Uniform Code of Military Justice, Article 71(c).

It is the Court's ruling that (1) the order confining petitioner to Fort Leavenworth constitutes execution of his sentence and is void, and (2) the Court has no jurisdiction or authority to interfere with the discretion of the military establishment concerning petitioner's custody, so long as such discretion is exercised within the framework of the Uniform Code of Military Justice.

IT IS, THEREFORE, ORDERED and ADJUDGED that the petitioner be, and he is hereby, relieved from the order requiring him to go to the disciplinary barracks at Fort Leavenworth, Kansas.

Dated this 24th day of May, 1968.

H. VEARLE PAYNE
United States District Judge

Opinion of the United States Court of Appeals

[Filed October 30, 1968]

UNITED STATES COURT OF APPEALS

Tenth Circuit

September, 1968, Term

Number 13-68

Captain Dale E. Noyd,

Appellant,

—vs.—

Major General Charles R. Bond, Jr., Commander, Twelfth Air Force, United States Air Force; Colonel George R. Doerr, Commander, 832nd Combat Support Group, and Commander, Cannon Air Force Base, New Mexico; Colonel Robert R. Scott, Commander, 832nd Air Division, Cannon Air Force Base, New Mexico; Colonel Jimmy J. Jumper, Commander, 27th Tactical Fighter Wing, Cannon Air Force Base, New Mexico; Lieutenant Colonel James L. Glessner, Jr., Commander, 524th Tactical Fighter Squadron, Cannon Air Force Base, New Mexico; Captain Charles Thompson, Commander, 832nd Security Police Squadron, Cannon Air Force Base, New Mexico,

Appellees.

Number 14-68

CAPTAIN DALE E. NOYD,

Cross-Appellee,

—VS.—

MAJOR GENERAL CHARLES R. BOND, JR., Commander, Twelfth Air Force, United States Air Force; COLONEL GEORGE R. DOERR, Commander, 832nd Combat Support Group, and Commander, Cannon Air Force Base, New Mexico; COLONEL ROBERT R. SCOTT, Commander, 832nd Air Division, Cannon Air Force Base, New Mexico; COLONEL JIMMY J. JUMPER, Commander, 27th Tactical Fighter Wing, Cannon Air Force Base, New Mexico; LIEUTENANT COLONEL JAMES L. GLESSNER, JR., Commander, 524th Tactical Fighter Squadron, Cannon Air Force Base, New Mexico; CAPTAIN CHARLES THOMPSON, Commander, 832nd Security Police Squadron, Cannon Air Force Base, New Mexico,

Cross-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

(District Court Number 7580)

MARVIN M. KARPATKIN, New York, New York (John DeJ. Pemberton, Burt Neuborne, New York, New York, Paul A. Phillips and F. Willard Kitts, Albuquerque, New Mexico, on the brief), *for Appellant and Cross-Appellee.*

JOHN QUINN, United States Attorney, Albuquerque, New Mexico (John A. Babington, Assistant United States Attorney, Albuquerque, New Mexico, on the brief), *for Appellees and Cross-Appellants.*

Before:

PHILLIPS, HILL and SETH, *United States Circuit Judges.*

HILL, *Circuit Judge.*

On March 8, 1968, Dale E. Noyd, a captain in the United States Air Force, was convicted by a general court martial of violating Article 90 of the Uniform Code of Military Justice in that he wilfully disobeyed a lawful military order. He was sentenced to dismissal from the service, forfeiture of all pay and allowances and confinement for one year at hard labor. On May 10, 1968, the general court-martial convening authority General Charles R. Bond, approved the conviction and ordered Noyd removed to the United States Disciplinary Barracks at Fort Leavenworth, Kansas, pending completion of military appellate review. Before the transfer order could be carried out, this petition for habeas corpus was filed in the federal district court of New Mexico. The petition asserted the foregoing facts and sought either release or bail or, in the alternative, maintenance of the pre-existing condition of confinement, namely, arrest in quarters at Cannon Air Force Base, Clovis, New Mexico.

The district court determined that to allow the transfer to Fort Leavenworth would be tantamount to an execution of the sentence prior to the completion of military review procedures. This being prohibited by Article 71(c) of the Uniform Code of Military Justice (UCMJ),[1] it was decreed that appellant be relieved from said order. Pursuant to the court's directive, the Air Force rescinded the transfer

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[1] Article 71(c) of the Uniform Code of Military Justice provides:

"No sentence which includes, unsuspended, a dishonorable or bad conduct discharge, or confinement for one year or more, may be executed until affirmed by a board of review and, in cases reviewed by it, the Court of Military Appeals." 10 U. S. C. §871(c).

order and directed that appellant be placed under guard and restricted to a room in the Visiting Officer's Quarters at Cannon Air Force Base. Both parties being dissatisfied with the disposition of the matter as it presently stands, this appeal followed.

At the outset we are faced with the familiar question of exhaustion of military remedies. Under well established military appellate procedure, appellant is entitled to obtain a review of his conviction by an Air Force Board of Review and, if a petition for review is granted, by the United States Court of Military Appeals. At the present time, the Board of Review has heard oral argument although no decision has yet been rendered. Thus, it is apparent that the military appellate procedures have not been pursued to finality.

It is well established, not only in this court[2] but by the United States Supreme Court[3] that habeas corpus is not available to review military confinement until after all remedies afforded by the UCMJ have first been exhausted. The policy underlying the requirement of exhaustion of state remedies applies with equal force to attacks upon the propriety of military confinement. Military law and state law both exist substantially independent and apart from the law governing the federal courts. All three separate judicial establishments necessarily reflect the effects of diverse functions. For this court to intervene in military matters prior to the full utilization of all means of rectification provided by that separate entity might well constitute

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[2] *Noyd* v. *McNamara*, 378 F. 2d 538 (10th Cir. 1967), cert. den. 389 U. S. 1082; *Gorko* v. *Commanding Officer*, 314 F. 2d 858 (10th Cir. 1963); *McKinney* v. *Finletter*, 205 F. 2d 761 (10th Cir. 1953); *Hunter* v. *Beets*, 180 F. 2d 101 (10th Cir. 1950), cert. den. 339 U. S. 963; and *McMahan* v. *Hunter*, 179 F. 2d 661 (10th Cir. 1950), cert. den. 339 U. S. 968. See Annot., 15 A. L. R. 2d 387 (1949).

[3] *Gusik* v. *Schilder*, 340 U. S. 128 (1950).

a needless interference with the procedures established to police the errors of that tribunal. Accordingly, if an available procedure has not been employed to permit the military to correct an alleged deficiency it is not for this court to undertake an untimely intervention.

Admittedly, appellant does not now attempt to collaterally attack the judgment of the court-martial on the merits. He seeks instead to obtain relief from his detention pending military appeal. Nonetheless, it is clear that this issue can be raised in the same manner on appeal to the proper military tribunal as if it related to any other failure to fully comply with the UCMJ.[4] Indeed, the Court of Military Appeals has recently held that it possesses the power to issue a habeas corpus writ in circumstances such as these.[5] Hence, it cannot be gainsaid that through a proper utilization of the review procedures established by the UCMJ appellant can raise the same issues presented here without going outside the system which initially, and at all times heretofore, has had the primary responsibility for his present confinement. As a result, available military review procedures remain to be utilized. We conclude, therefore, that appellant has failed to exhaust his military remedies.[6]

The order of the district court in granting partial relief is therefore vacated and the judgment is REVERSED.

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[4] E.g., *United States* v. *Smith*, 2 CMR 817 (1952); *United States* v. *Ranes*, 3 CMR 550 (1952); *United States* v. *Lucero*, 18 CMR 942 (1955); and *United States* v. *Lock*, 36 CMR 72 (1965).

[5] *Levy* v. *Resor*, 37 CMR 399 (1967).

[6] This court in requiring that appellant first exhaust all available military remedies, does so after fully recognizing that "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment." *Burns* v. *Wilson*, 346 U. S. 137, 140 (1953).

Order Granting Release

SUPREME COURT OF THE UNITED STATES

No. 830—October Term, 1968

Capt. Dale E. Noyd,

—v.—

Maj. Gen. Charles R. Bonds, Jr., *et al.*

Application for Release

(December 24, 1968)

Mr. Justice Douglas.

Petitioner, incarcerated as a result of a court martial, has filed a petition for writ of certiorari to the Tenth Circuit Court of Appeals denying him standing to challenge the place and manner of his incarceration[1] prior to final review of his conviction because he had not exhausted all of his military remedies. Unlike *Gusik* v. *Schilder*, 340 U. S. 128, this habeas corpus proceeding in the federal courts does not challenge purported error in a court martial trial prior to exhaustion of military reme-

[1] Art. 71(c) of the Uniform Code of Military Justice provides: "No sentence which includes, unsuspended, a dishonorable or bad-conduct discharge, or confinement for one year or more, may be executed until affirmed by a board of review and, in cases reviewed by it, the Court of Military Appeals."

dies. Rather the question is whether the doctrine of exhaustion of military remedies applies where the question is whether the court martial authority acts outside its jurisdiction. Cf. *United States* v. *McElroy,* 258 F. 2d 927, 929, aff'd 361 U. S. 281. That question seems to be one of first impression.

The question seems to me to be a substantial one on which the full Court should pass, which it will not be able to do until January 10, 1969.[2] I therefore have concluded that until the Court is able to pass on the petition for writ of certiorari, petitioner should be placed in a non-incarcerated status, which as the District Court said, should prevent his superiors from "assigning the plaintiff to combat activity or requiring him to perform duties whereby he will be perhaps faced with the necessity of a General Court Martial or other proceedings that might injure him as a practical matter."

The precise terms and conditions may be settled by the District Court.

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[2] My brother WHITE denied this application December 18, 1968; and I would therefore take this present application to the full Court were the members available. But since I feel that a substantial question is presented by the petition for writ of certiorari and since the problem raises a further issue, also unresolved, concerning the scope of review by the Court of Military Appeals and the role reserved for the regular federal courts, I feel that petitioner is entitled to relief pending consideration of the petition for certiorari January 10, 1969.

Order Granting Writ of Certiorari

SUPREME COURT
OF THE UNITED STATES

January 20, 1969

"The petition for a writ of certiorari is granted and the case is placed on the summary calendar. The stay heretofore granted by Mr. Justice Douglas shall remain in effect pending the issuance of the judgment of this Court or until further order of this Court."

General Court-Martial Order No. 13

DEPARTMENT OF THE AIR FORCE

HEADQUARTERS TWELFTH AIR FORCE (TAC)

Waco, Texas 76703

GENERAL COURT-MARTIAL ORDER 10 May 1968

NUMBER 13

Before a General Court-Martial which convened at Cannon Air Force Base, New Mexico, pursuant to Special Order C-2, Headquarters Twelfth Air Force (TAC), 17 January 1968, was arraigned and tried:

CAPTAIN DALE E. NOYD, FR28084, United States Air Force, 524th Tactical Fighter Squadron

CHARGE: Violation of the Uniform Code of Military Justice, Article 90

Specification: In that CAPTAIN DALE E. NOYD, United States Air Force, 524th Tactical Fighter Squadron, 27th Tactical Fighter Wing, Cannon Air Force Base, New Mexico, having received a lawful command from Colonel Homer K. Hansen, his superior officer, "To perform duties as instructor pilot tomorrow, 5 December 1967, as scheduled," did, at Cannon Air Force Base, New Mexico, on or about 5 December 1967, willfully disobey the same.

PLEAS: To the Charge and Specification: Not guilty

FINDINGS: Of the Specification and Charge: Guilty

SENTENCE: To be dismissed from the service, and to forfeit all pay and allowances, and to be confined at hard labor for one year. (No previous convictions considered.)

DATE ADJUDGED: The sentence was adjudged on 9 March 1968.

ACTION BY CONVENING AUTHORITY

DEPARTMENT OF THE AIR FORCE, HEADQUARTERS TWELFTH AIR FORCE (TAC), Waco, Texas, 10 May 1968

In the foregoing case of CAPTAIN DALE E. NOYD, FR28084, United States Air Force, 524 Tactical Fighter Squadron, the sentence is approved. The forfeitures shall apply to pay and allowances becoming due on and after date of this action. The record of trial is forwarded to The Judge Advocate General of the United States Air Force for review by a board of review. Pending completion of appellate review, the accused will be confined in the United States Disciplinary Barracks, Fort Leavenworth, Kansas.

/s/ Charles R Bond Jr.
CHARLES R. BOND, JR., Maj. Gen, USAF
Commander

FOR THE COMMANDER

[SEAL]

EDWARD D SMITH, Lt Col, USAF
Director of Admin Services

Letter Regarding Arrest in Quarters

25 Jun 1968

Reply to attn of: CSC

Subject: Arrest in Quarters—Limitations on Your Activities

To: Captain Dale E. Noyd
Room 15, Building T–55
Cannon AFB, New Mexico 88101

1. Your place of arrest in quarters will continue to be Room 15, Building T–55, Cannon Air Force Base, New Mexico. However, the terms of your arrest are changed as follows to limit your activities:

a. You will be allowed to go to the dining hall only between 0700 and 0745 hours, and between 1145 and 1230 hours, and between 1700 and 1745 hours daily.

b. You will be allowed to visit the mail room only between 0700 and 0745 hours and between 1700 and 1745 hours daily.

c. You will be allowed to visit the Base Exchange only between 1000 and 1030 hours each Tuesday.

d. You will be allowed to visit the Base Laundry concessionaire only between the hours of 1030 and 1100 each Tuesday.

e. You will be allowed to visit the Base Library only between the hours of 1800 and 1900 each Thursday.

f. You will be allowed to visit the Base Barber Shop only between the hours of 0800 and 0900 each Tuesday.

g. You may visit the Base Gym for exercise between 0900 and 1030 hours on Friday provided you are accompanied by Captain Bruce H. Anderson or Captain (Dr.) Gregory R. Bonomo, and you will associate with no other person during these periods.

h. You will be allowed to visit the Chapel only once on Sunday.

In case any of the facilities listed in b through g are to be closed at these enumerated times because of a holiday or inventory, etc., you may substitute the preceding day.

You will not be escorted on these trips, however, you will take only the time necessary to accomplish these trips and return immediately to your quarters, but in no event will you take more time than the times enumerated above. Upon leaving and returning to your quarters for any reason you will notify Security Police Operations. In case of inclement weather or some other reason you need motor transportation on any of these trips, the Security Police will provide such transportation. You will wear the appropriate uniform at all times when you are not in your quarters. You will not leave your quarters for any other reason without permission of the Base Commander, except as follows: You may leave your quarters to visit the Base Hospital without prior notification to anyone at any time you have a medical or dental emergency. In case you need medical or dental attention not amounting to an emergency, you will notify Security Police Operations and then proceed to the hospital.

2. You will be authorized to have TV cable, a telephone and maid service in your room at your own expense.

3. Your quarters will be off limits to all personnel with the following exceptions:

a. You may have any defense counsel visit you at any time.

b. Members of your family may visit you two times a week for a period of two hours per visit on Wednesdays between 1400 and 1600 hours and on Sundays between 1400 and 1600 hours.

c. You may have other friends visit you once a week for a period of one hour on Thursdays between 1500 and 1600 hours. Any other persons wishing to visit you must have prior permission of the Base Commander.

4. You will acknowledge receipt of this communication by indorsement hereon and indicate therein your complete understanding of the same.

GEORGE R. DOERR,
Colonel, USAF, Commander.

Receipt acknowledged and contents understood.

/s/ Dale E. Noyd,
DALE E. NOYD,
Captain, USAF.

Date: 28 Jun 68

Opinion of the Air Force Board of Review

DEPARTMENT OF THE AIR FORCE

OFFICE OF THE JUDGE ADVOCATE GENERAL

Washington, D. C.

In the Board of Review, United States Air Force

Before

WILSON, *Chairman*, BOUCHER and TORVESTAD, *Members*

Judge Advocates

AFJAMA-2 ACM 20121

UNITED STATES

—v.—

Captain DALE E. NOYD, FR28084,
524th Tactical Fighter Squadron

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3 September 1968

TWELFTH AIR FORCE (TAC)

Sentence adjudged 9 March 1968 by GCM convened at Cannon Air Force Base, New Mexico. Approved sentence: Dismissal from the service, forfeiture of all pay and allowances, and confinement at hard labor for one (1) year.

Appearances:

Mr. Marvin M. Karpatkin and Mr. John deJ. Pemberton, Jr., New York, New York, Colonel Dwight R. Rowland, Colonel Joseph E. Krysakowski and Lieutenant Colonel Leonard Eichner, appellate counsel for the accused;

Colonel James R. Thorn and Major Robert L. Bates, appellate counsel for the United States.

Tried by a general court-martial convened at Cannon Air Force Base, New Mexico, the accused was found guilty of willfully disobeying the lawful command of his superior officer, in violation of Article 90 of the Uniform Code of Military Justice. He was sentenced to dismissal, forfeiture of all pay and allowances, and confinement at hard labor for one year. The convening authority designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement pending completion of appellate review.[1]

The specification of which accused stands convicted is as follows:

> "In that [accused] . . . having received a lawful command from Colonel Homer K. Hansen, his superior officer, 'To perform duties as instructor pilot tomorrow, 5 December 1967, as scheduled,' did, at Cannon Air Force Base, New Mexico, on or about 5 December 1967, willfully disobey the same."[2]

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[1] The designation of the United States Disciplinary Barracks as the place of confinement pending completion of appellate review is under collateral attack (Noyd v. Bond, Civil No. 7560, —— F. Supp. ——, decided 24 May 1968 (DC NMex 1968), appeal and cross-appeal pending).

[2] Although the order was one to be obeyed *in futuro*, the evidence establishes that accused stated that he would not obey it and he carried out his intention (MCM, 1951, para. 169*b*; CM 349288, Cunningham, 2 CMR 466).

The principal defense advanced by the accused is that the Secretary of the Air Force made an error of law in disapproving the accused's two applications under Air Force Regulation 35-24, DISPOSITION OF CONSCIENTIOUS OBJECTORS, for classification as a conscientious objector and either separation or reassignment as a conscientious objector.

The facts are uncontested. In brief, the accused participated in the Air Force ROTC program at Washington State University for four years and in 1955 graduated as a distinguished military graduate. He then accepted a regular Air Force commission and has been on continuous active duty since that time. He received pilot training and is presently a senior pilot. At the expense of the Air Force he was a graduate student at the University of Michigan for three years and received a masters degree. He also completed the academic study necessary for a Ph.D degree. In return for the Air Force financing his graduate study, he committed himself to serve until June 1969.

In 1966, while a member of the faculty of the Air Force Academy, the accused developed a belief in ethical or religious "humanism", and decided that the conflict in Vietnam is unjust and immoral. He determined to refuse to fight in that conflict, if ordered to do so, but that he would accept assignments to duty consistent with his conscience. He subsequently tendered his resignation under the provisions of AFR 36-12, ADMINISTRATIVE SEPARATION OF COMMISSIONED OFFICERS AND WARRANT OFFICERS OF THE AIR FORCE. The Secretary of the Air Force refused to accept the resignation. The accused then submitted the first of two applications under AFR 35-24 for classification as a conscientious objector and either separation or reassignment as a conscientious objector. This application was disapproved by the Secretary of the Air Force.

The accused thereupon commenced an action in a Federal district court seeking declaratory relief, an injunction, and writs of habeas corpus and mandamus. The accused asked for substantially the same relief which had been denied him in his application under AFR 35-24. The district court ordered the action dismissed for lack of jurisdiction (Noyd v. McNamara, 267 F Supp 701 (DC Colo 1967), affd 378 F2d 538 (10th Cir 1967), cert. den. 389 US 1022, 19 L Ed 2d 667, 88 Sup Ct 593).

After the adverse decision in the district court, the accused, who had theretofore been transferred to Cannon Air Force Base, New Mexico, filed his second application under AFR 35-24. In August, 1967, the Secretary likewise disapproved this application.

The circumstances surrounding the offense of which accused stands convicted are concisely set forth in a statement, admitted in evidence as a defense exhibit, of the superior officer named in the specification. It accurately summarizes his sworn testimony at the trial:

> "After I had given Captain Noyd a direct order at 1115 hours, 4 December 67, to fly as scheduled, I released him to return to the squadron. Upon return the Commander of the 524TFS, Lt Colonel James L Glessner, excused him, at his request, to take care of personal matters to wit; visit the legal office. As a consequence, I requested he be informed of the flight schedule of 5 December which ordered him to fly as instructor in an F-100F with a student. Further, I requested he return to see me at 1545 on 4 December at which time I stated:
>
> 'I understand your squadron commander approved your request at noon for time to take care of personal

matters. This occurred after I had given you a direct order to comply with the flight schedule which assigned you to a training flight in an F-100F with 2nd Lt Matthew A Husson with takeoff at 1310.

'As a consequence, I am giving you a direct order to perform duties as instructor pilot tomorrow, 5 December, as scheduled. As I stated previously, I am aware of your conscientious beliefs with regard to performing duties as an instructor pilot, your application to be classified as a conscientious objector which has been denied and that you have taken this matter up with the federal courts and that you are awaiting a decision by the Supreme Court of the United States.

'Until such time the federal courts render a decision favorable to you, you are still required to perform proper military duties assigned to you and obey all lawful orders given to you and that your failure to do so can conceivably result in trial by General Courts-Martial. I am not desirous in resorting to such course of action, and therefore, I am giving you a direct order to perform duties as instructor pilot as scheduled. I have nothing further to add.'

"Captain Noyd stated that after he had declined to fly he thought it was clear to everyone that he was not following orders. Further he stated that he fully understood what I had stated and asked if there was anything more, saluted, and left."

The accused testified that he "knew in advance" that he could not obey the order; that at the time he was not suffering from any mental disease, or derangement of a nature

that could have prevented him from knowing the difference between right and wrong and adhering to the right; and that the violation of the order was a conscious, voluntary choice on his part. He also testified that, "In a sense I would say I had no choice, because I felt that it was what I must do".

After the trial, individual defense counsel assigned 18 errors and presented oral argument to the Staff Judge Advocate. The allegations of error were extensively discussed in the competent and scholarly review of the Staff Judge Advocate and resolved adversely to the accused. Appellate defense counsel have assigned 19 errors, 18 of which are identical with those assigned and argued below and resolved in the review. We agree with the Staff Judge Advocate's disposition of these allegations and adopt his conclusions, with the further discussion set forth hereinafter. As to the remaining assigned error submitted by appellate defense counsel, we find that it is entirely without merit and requires no discussion.

Our decision in ACM 20016, Dunn, —— CMR ——, decided 1 May 1968, answers the contention that the Secretary of the Air Force made an error of law in denying the accused's applications under AFR 35-24 for classification as a conscientious objector. In *Dunn,* the defense likewise demanded a judicial review within the court-martial system of a Secretarial determination that the accused was not entitled to an administrative discharge as a conscientious objector. We held:

> "The obvious answer is that such judicial review was not within the jurisdiction of the court-martial which tried the accused. The jurisdiction of a court-martial is a very limited jurisdiction derived from the power of the Congress, in Article I, Section 8, Clause

14, of the Constitution 'To make Rules for the Government and Regulation of the land and naval Forces' (Reid v. Covert, 354 US 1, 1 L Ed 2d 1148, 77 Sup Ct 1222). In its exercise of this power, the Congress did not include in the Uniform Code of Military Justice a grant of jurisdiction to military tribunals to review such administrative determinations.

"Voluntarily enlisted servicemen are a distinct class from inducted civilians. Military regulations providing a procedure for voluntarily enlisted servicemen to request discharge on the ground of conscientious objection reached after enlistment do not deny procedural due process or equal protection under the Constitution. And it is the Federal, not the military, courts which have jurisdiction in a proper case to review proceedings under such military regulations to determine whether there has been substantive due process (Brown v. McNamara, 387 F 2d 150 (3rd Cir 1967) [cert. den. sub nom. Brown v. Clifford, 390 US 1005, 20 L Ed 2d 105, 88 Sup Ct 1244])." (*Dunn*, supra, at p. ——).

It is not within our province to suggest at what stage a question of substantive due process in proceedings under AFR 35-24 may be ripe for adjudication in the Federal courts. In this connection, we observe that in *Noyd*, supra, the Court of Appeals, in affirming the order of the district court dismissing the action for lack of jurisdiction, held that:

"The *essence* of appellant's claim is that the Federal judiciary should review and determine the validity of military assignments to duty. This we cannot do." (378 F 2d, at p. 540). (Emphasis added).

We also observe that in a recent military habeas corpus case involving a conscientious objector claim, Hammond v. Lenfest, No. 31909, —— F 2d —— (2d Cir), decided 10 June 1968, the court stated:

> "Principal reliance is placed [by the Government] upon the recent decision in Noyd v. McNamara, 267 F. Supp. 701 (D. Colo.), aff'd, 378 F. 2d 538 (10th Cir.), cert. denied, 389 U.S. 1022 (1967), in which the District Court refused to examine the conscientious objector claim of an Air Force captain with 11 years' service who was not a 'total pacifist' but was merely opposed 'to the war that this country is waging in Vietnam.'" 267 F. Supp. at 703-04. It is possible to read Noyd as nothing more startling than an application of the settled doctrine that the federal courts will not interfere with duty assignments of persons lawfully in the armed forces, Orloff v. Willoughby, 345 U.S. 83 (1953). See Crane v. Hedrick, —— F. Supp. ——, —— (N.D. Cal. 1968). To the extent that Noyd might suggest that a court martial is a prerequisite for federal court review of the claim that the petitioner, at the time of bringing suit, is not lawfully in the armed forces, we reject its reasoning. For several sufficient reasons we hold that Hammond's claim is now ripe for adjudication.
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> . . . . .
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> "Furthermore, Hammond contends—and the government does not assure us otherwise—that a court martial would consider itself bound by the determination of the Chief of Naval Personnel and would not entertain a challenge to the denial of Hammond's request. See Brown v. McNamara, 387 F. 2d 150, 153 n. 5

(3d Cir. 1967), cert. denied, —— U.S. —— (1968) (noting, but not ruling upon, the instant contention). And, we are referred to no case that suggests that presenting a conscientious objector claim as a defense to a charge of violating military law by failing to obey orders would be anything more than a futile and ritualistic gesture. The law knows of no such requirement."

As to the claim that the law officer erred in refusing the defense's requested instructions involving the proposition that accused's beliefs could have rendered him mentally incapable of intentionally defying authority, the record clearly establishes that the accused, the same as Cupp (ACM 13462, Cupp, 24 CMR 565, 572), made a self-determined, voluntary, and intentional choice as to which military orders and duties he would accept or reject. *Dunn* likewise governs this issue. The relevant language in *Dunn* follows:

"It is well established that a self-determined conscientious objection is not a defense to the willful disobedience of military orders. As recently held by an Army Board of Review in a similar case involving a self-determined conscientious objector:

"'We reduce the applicable military law, as we see it, to one simple statement,

'Personal scruples or qualms, whether based upon religious conviction, personal philosophy or other, are no defense to military offenses. (Subpara 169b, MCM, US, 1951; ACM 9036, Morgan, 17 CMR 584; ACM 13462, Cupp, 24 CMR 565).' (CM 413709, Taylor, 37 CMR 547, 552).'" (Dunn, supra, at p. ——).

Moreover, the record discloses that the instructions given by the law officer in this respect exceeded the requirements of the law, and in fact are substantially in accord with the defense's requested instructions. Having received a gratuity, the accused can not now be heard to complain.

The remaining assigned error for our discussion is that the law officer erred in denying the accused's challenge to the array for cause and the motion for mistrial based thereon.

After an extensive voir dire of the 10 court members, individual defense counsel made a motion either to dismiss the entire panel or to grant a mistrial. He pointed out that the examination revealed that all 10 members of the court, except one, had either served in Southeast Asia, or were involved in the training of personnel for service in that area. He argued that this circumstance alone was sufficient *as a matter of law* to establish that the members could not be fair and unbiased.

The law officer ruled that the motion was, in effect, a challenge for cause against the entire panel. In overruling the motion, the law officer advised that the ruling did not preclude the defense from challenging individual members and having such challenges determined by the other members. Defense counsel stated that he was not making any challenges for cause as it would be futile. He challenged one member peremptorily.[3]

Appellate defense counsel have submitted to the Board of Review a roster of all field grade officers (except chap-

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[3] Appellate defense counsel criticize the procedure for challenges for cause prescribed in Articles 41, 51, and 52 of the Code. In this regard, we need say no more than that the United States Court of Military Appeals, in sustaining the present procedure, has recommended amendatory legislation (U.S. v. Cleveland, 15 USCMA 213, 35 CMR 185).

lains) assigned to the 12th Air Force as of the date of the appointing order.[4] According to the roster, at that time there were 1623 so assigned. Of that number, 550, or 34%, had their last tours of duty in Southeast Asia.

Counsel argue that since only 34% of the officers assigned to the 12th Air Force had their last tours of duty in Southeast Asia, the fact that 80% of the panel in this case consisted of recent Southeast Asia returnees gives the appearance of a hand-picked panel. They present this novel argument in their brief:

> "Among the members of the array were officers who had flown one hundred and more combat missions in Southeast Asia. Many of them undoubtedly had friends who were shot down. It is common knowledge that every Air Force man who flies in combat has great concern for the safety of his 'wing man', and expects his wing man to have similar concern for him. Added to the combat experience is the ingrained attitude of obedience to all orders without question . . . . When a career officer, a fighter pilot, accused of disobeying an order to train a pilot for combat in Vietnam, is put on trial before a General Court, it would require more than normal human efforts to overcome possible bias, even for a single court member. But where 4/5th of the court are all subject to these same conditioning factors, it is simply impossible to have a fair trial."

Understandably, the defense cites no authority, and our research has found none, which suggests that combat ser-

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[4] Submission of roster made on motion granted by the Board of Review in the exercise of its discretionary authority (Rule 18e, Uniform Rules of Procedure for Proceedings In and Before Boards of Review, 37 CMR xv, xx).

vice as a member of the armed forces of the United States can result in disqualification *as a matter of law* to serve as a member of a court-martial.

Obviously, it could not be seriously contended that those who have served honorably on the field of battle are disqualified *as a matter of law,* individually or collectively, to serve as members of a court-martial in trials involving heinous offenses, such as mutiny or sedition (Article 94), cowardly conduct in the presence of the enemy (Article 99), or aiding the enemy (Article 104). *A fortiori,* a combat background cannot be considered disqualifying as a matter of law in trials involving any offenses of lesser gravity.

The record discloses no impropriety in the selection of the members of the court. They were not "minions of law enforcement agencies" (U.S. v. Hedges, 11 USCMA 642, 29 CMR 458, concurring opinion by Judge Latimer). There is no appearance of a court hand-picked to favor the prosecution. We conclude that the convening authority appointed as members of the court only such persons as, in his opinion, were "best qualified for the duty by reason of age, education, training, experience, length of service and judicial temperament" (UCMJ, Art. 25(d)(2); MCM, 1951, para. 4*d*). There is no evidence to the contrary.

The record of trial clearly establishes there was no bias on the part of any court member. All members expressed their willingness to try the case on the evidence and to follow the instructions on the law given by the law officer.

An accused is not entitled to favorable court members or any particular kind of juror (U.S. v. Sutton, 15 USCMA 531, 36 CMR 29). He has no right to jurors who believe him innocent; however, he does have an unqualified right to jurors whose minds are uncommitted (U.S. v. Deain, 5 USCMA 44, 17 CMR 44). We are fully satisfied the accused

was afforded that right and that the law officer properly denied the motion for a mistrial (U.S. v. Waldron, 15 USCMA 628, 36 CMR 126).

In addition, the fairness and impartiality of the court members is demonstrated by the fact that, notwithstanding the seriousness of the offense, they adjudged a lenient sentence.

In evaluating the appropriateness of the sentence, we have thoroughly considered all the factors and surrounding circumstances in the record. We conclude that the approved sentence is appropriate and should be affirmed.

Article 66(c) having been complied with, the findings of guilty and the sentence are

AFFIRMED.

CHESTER W. WILSON
ERNEST BOUCHER
ROBERT J. TORVESTAD

Opinion of the District Court, District of Colorado, Dated March 29, 1967

Noyd v. *McNamara, et al.*

WILLIAM E. DOYLE, *U.S.D.J.*:

This is an action in which the plaintiff, in a lengthy complaint in which he names the Secretary of Defense, Secretary of the Air Force, Chief of Staff of the Air Force, Superintendent of the Air Force Academy and other officials, seeks declaratory relief and applies for habeas corpus, seeks injunctive relief and, at the moment seeks a preliminary injunction.

The factual basis for this is that plaintiff has declared himself to be a conscientious objector and, notwithstanding that fact, the Air Force proposes to transfer him to Cannon Air Force Base, New Mexico, as of April 1, 1967. The allegation is that this is a training base, or jumping-off base for Vietnam, and that he will be compelled, contrary to his beliefs, to at least train fliers who are going to Vietnam, and he says that this is work that is contrary to his conscientious scruples.

It is to be gleaned from reading the complaint and from statements of counsel that plaintiff is not a member of any religious group, but rather that he holds a philosophy which he declares as "ethical humanism" which dictates these scruples against war. It is also to be gleaned that he does not object to all war; that he objects rather to particular wars of aggression, but specifically to the Vietnam War and that he would not be a conscientious objector if it were a matter of defending the United States. He doesn't rule out the possibility that he would go to foreign countries first in order to carry out an assignment of defending the United States.

From this it is maintained by the defendants that he is not entitled to be classified as a conscientious objector and that it is clear from the record as applied to the statute involved, 50 U. S. C. §456(j), that he is not opposed to war in any form. A definition contained in the statute is called to the Court's attention, and although it is set up in a somewhat left-handed way, it suggests this interpretation. However, an examination of the cases does not bear this out because the Supreme Court has given a broad interpretation to the term, particularly the Seeger case which was cited to me, *United States* v. *Seeger,* 380 U. S. 163, 88 S. Ct. 850 (1965). Although it doesn't deal specifically with whether one can be a conscientious objector in a limited way, it does indicate that there are no particular limitations upon holding these conscientious views in terms of the kind of regimentation or the philosophy that moves one to adopt such views. Moreover, a similar judicial viewpoint, attitude, or approach is made in *Sicurella* v. *United States,* 348 U. S. 404, 75 S. Ct. 403 (1965), so that I must conclude from reading these cases that the complaint is not entirely without substance and that it does demand that the case be given further study.

It has also been strongly urged by the defendants that we do not have jurisdiction to hear and determine the matter. Yet, an almost identical motion was considered by the Court of Appeals for the District of Columbia in the case of *Gallagher* v. *Quinn,* 363 F. 2d 301, in an opinion by Judge Fahy, which specifically recognizes that there is jurisdiction over the subject matter in a factual context similar to this one. So I do feel that it is a case in which a full hearing should be had, either now or later. Indeed, it is going to have to be had, and if this Court were to dismiss this complaint upon the basis of the brief hearing that was had here today, I think that it almost certainly

would be referred back for a hearing in depth on its merits. So, without determining definitely that the cause is one that is meritorious, without intending to establish any precedent for this type of case, it is this Court's conclusion that there is enough merit expressed and there is probable jurisdiction shown justifying the granting of some kind of relief, with a view to taking a closer look at it in an unhurried atmosphere and after both sides have had an opportunity to prepare themselves.

I note that this case was filed on Monday. I have had no opportunity to read the complaint. We heard it this morning. I have been tied up all afternoon and have not had an opportunity to study it. The views expressed are not studied, but they are viewpoints I have arrived at from hearing counsel and from the limited amount of study I have given it. I do feel that this requires a full hearing and this is why I have determined that a preliminary injunction should issue against assigning the plaintiff to combat activity or requiring him to perform duties whereby he will be perhaps faced with the necessity of a General Court Martial or other proceedings that might injure him as a practical matter. I do not wish to interfere with the power of the Air Force to move him from one place to another; in other words, I do not wish to exercise any more power than is necessary under the circumstances and, accordingly, the injunction, or restraining order which is entered is against requiring the plaintiff, until the further order of the Court and until a hearing on the merits can be had, to perform combat-type activity, directly or indirectly. The Court does hold that it retains jurisdiction of the controversy and it is suggested that we try the case on the merits in about three weeks from today, Wednesday, April 19, commencing at 9:30 o'clock a.m.

I would ask counsel to prepare an order consistent with the statements made here.

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Supreme Court of the United States

OCTOBER TERM, 1968

No. 830

CAPTAIN DALE E. NOYD,

Petitioner,

—v.—

MAJOR GENERAL CHARLES R. BOND, JR., Commander, Twelfth Air Force, United States Air Force; COLONEL GEORGE R. DOERR, Commander, 832nd Combat Support Group, and Commander, Cannon Air Force Base, New Mexico; COLONEL ROBERT R. SCOTT, Commander, 832nd Air Division, Cannon Air Force Base, New Mexico; COLONEL JIMMY J. JUMPER, Commander, 27th Tactical Fighter Wing, Cannon Air Force Base, New Mexico; LIEUTENANT COLONEL JAMES L. GLESSNER, JR., Commander, 524th Tactical Fighter Squadron, Cannon Air Force Base, New Mexico; CAPTAIN CHARLES THOMPSON, Commander, 832nd Security Police Squadron, Cannon Air Force Base, New Mexico,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Supreme Court of the United States

OCTOBER TERM, 1968

No. .....

CAPTAIN DALE E. NOYD,

Petitioner,

—v.—

MAJOR GENERAL CHARLES R. BOND, JR., Commander, Twelfth Air Force, United States Air Force; COLONEL GEORGE R. DOERR, Commander, 832nd Combat Support Group, and Commander, Cannon Air Force Base, New Mexico; COLONEL ROBERT R. SCOTT, Commander, 832nd Air Division, Cannon Air Force Base, New Mexico; COLONEL JIMMY J. JUMPER, Commander, 27th Tactical Fighting Wing, Cannon Air Force Base, New Mexico; LIEUTENANT COLONEL JAMES L. GLESSNER, JR., Commander, 524th Tactical Fighter Squadron, Cannon Air Force Base, New Mexico; CAPTAIN CHARLES THOMPSON, Commander, 832nd Security Police Squadron, Cannon Air Force Base, New Mexico,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on October 30, 1968.

Opinions Below

The Court of Appeals for the Tenth Circuit reversed the decision of the United States District Court for the District of New Mexico, Hon. H. Vearle Payne, Chief Judge, presiding, in an opinion which is not yet reported, and is printed in the Appendix, *infra,* p. 1a. The opinion of the District Court is reported at 285 F. Supp. 785 (D. N. Mex. 1968), and is printed in the Appendix, *infra,* p. 7a.

Jurisdiction

The judgment of the Court of Appeals was entered on October 30, 1968. Jurisdiction is conferred on this Court pursuant to 28 U. S. C. §1254(1).

Questions Presented

1. Where a military prisoner is ordered into confinement to commence serving a court-martial sentence, in apparent violation of a provision of the Uniform Code of Military Justice which forbids execution of such sentence until after the completion of military appellate review, is a Federal court deprived of habeas corpus jurisdiction by the doctrine of exhaustion of military remedies?

2. Can a military prisoner be ordered into confinement to commence serving a court-martial sentence of one year's confinement prior to the completion of military appellate review in the face of Article 71(c) of the UCMJ which forbids execution of such sentence until after the completion of military review?

3. Petitioner is an Air Force officer who became a conscientious objector after 11 years of honorable service, and whose application for classification as a conscientious objector and either separation or reassignment to duties not conflicting with his conscience, was denied by the Secretary of the Air Force. Judicial review of the denial of his application was declined by the U. S. District Court for the District of Colorado and by the 10th Circuit on the grounds of exhaustion of military remedies, such courts holding that wrongful denial could be raised as a defense to any ensuing court-martial for disobedience of an order. This Court denied certiorari. At the ensuing general court-martial, petitioner was convicted of disobedience and sentenced to dismissal, total forfeiture of all pay and allowances, and confinement for one year. In such court-martial proceeding and in the review thereof by an Air Force Board of Review, jurisdiction to consider petitioner's defense based on wrongful denial of conscientious objection was again declined, the Board of Review holding that only the Federal courts had jurisdiction to remedy erroneous administrative action by the Secretary of the Air Force. Although UCMJ, Article 71(c) forbids execution of any sentence involving confinement of one year or more prior to the completion of military appellate review, petitioner was ordered into confinement by respondents "pending completion of appellate review."

(a) Under these circumstances has petitioner been deprived of his liberty without due process of law in that he has been tried, convicted, sentenced, and ordered into confinement before there has been any hearing on the merits of his case?

(b) Is the 10th Circuit's reversal of the District Court's partial grant of habeas corpus, again on grounds of exhaustion of military remedies, an unconstitutional suspension of the writ of habeas corpus?

Constitutional and Statutory Provisions Involved

Fifth Amendment to the United States Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution, Article I, Section 9(2):

> "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

28 U. S. C. §2241(a):

> "(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had."

Uniform Code of Military Justice, Art. 71(c); 10 U. S. C. §871(c):

> "(c) No sentence which includes, unsuspended, a dishonorable or bad-conduct discharge, or confinement for one year or more, may be executed until affirmed by a board of review and, in cases reviewed by it, the Court of Military Appeals."

Statement of the Case

Petitioner, a Captain in the United States Air Force, was convicted on March 8, 1968 by a General Court-Martial at Cannon Air Force Base, Clovis, New Mexico, of violating Article 90 of the Uniform Code of Military Justice. Article 90 proscribes the willful disobedience of a lawful order. The order which Captain Noyd, a former fighter pilot, was accused of disobeying was that he fly an instructional mission with a student pilot in order to train him for combat duty in Vietnam. Petitioner's principal defense was that, prior to the order in question, he had made application for separation or reassignment as a conscientious objector, that such application had been wrongfully denied by the Secretary of the Air Force pursuant to an error of law, and that such error of law tainted the subsequent order to train the student pilot and rendered it illegal. The essential error of law made by the Secretary, and the underlying substantive question in all of the Noyd litigation[1] is that Captain Noyd was deemed disqualified

[1] The first case was the unsuccessful effort to secure pre-court martial judicial review of the denial of his application, *Noyd* v. *McNamara*, 267 F. Supp. 701 (D. Colo. 1967), aff'd 378 F. 2d 538 (10th Cir. 1967), cert. den. 389 U. S. 1022 (1967). Next came the court-martial proceedings, *U. S.* v. *Noyd*, ACM 20121, —— CMR ——. This case, *Noyd* v. *Bond, supra*, was instituted in an effort to prevent the unlawful execution of Capt. Noyd's sentence of one year's confinement prior to completion of appellate review.

because he was a discriminating pacifist rather than a universal pacifist.

On March 9, 1968, he was sentenced to dismissal from the service, forfeiture of all pay and allowances and one year's confinement. Immediately following his sentence, petitioner was ordered confined to his quarters pending appeal by order of respondent Colonel Doerr, the Base Commander of Cannon Air Force Base. On May 10, 1968, the General Court-Martial convening authority, the respondent General Bond, approved the conviction and sentence and ordered petitioner confined at the United States Disciplinary Barracks, Fort Leavenworth, Kansas "pending completion of appellate review." [Headquarters, Twelfth Air Force (TAC), General Court-Martial Order No. 13 dated 10 May 1968 (hereinafter "GCMO13")]. GCMO13 is printed in the Appendix, *infra*, p. 13a, see *infra*, p. 14a.

Pursuant to military law, petitioner was entitled to appellate review of his conviction by an Air Force Board of Review and further review, on petition for grant of review, by the United States Court of Military Appeals. On September 3, 1968, an Air Force Board of Review upheld petitioner's conviction, ruling that it lacked jurisdiction to review whether the Secretary had acted unlawfully. *United States* v. *Noyd*, ACM 20121, —— CMR ——. The opinion of the Air Force Board of Review has not yet been reported. It is printed in the Appendix, *infra*, p. 15a. Captain Noyd's petition for grant of review to the Court of Military Appeals was filed on November 22, 1968, and is currently pending.

The only judge thus far to rule on the merits of Captain Noyd's defenses was sufficiently moved to issue a preliminary injunction restraining the Air Force from placing Captain Noyd in a position where he would be compelled to

disobey an order. *Noyd* v. *McNamara,* —— F. Supp. —— (D. Colo., Mar. 29, 1967) *per* Judge Doyle. This decision by Judge Doyle has not yet been reported. It is printed in the Appendix, *infra,* p. 28a. Judge Doyle subsequently invoked the doctrine of exhaustion of military remedies and ruled that the merits of Captain Noyd's legal defenses must be passed upon by the military courts prior to consideration by the Federal District Court. *Noyd* v. *McNamara,* 267 F. Supp. 701 (D. Colo. 1967), aff'd 378 F. 2d 538 (10th Cir. 1967), cert. den. 389 U. S. 1022 (1967). Unfortunately, the military courts have, thus far, declined to pass upon those defenses. See Appendix, *infra,* pp. 20a-23a.

Nevertheless, Captain Noyd has been in physical confinement since March 9, 1968, pending appellate review of his conviction. Not content with confinement to his quarters at Cannon Air Force Base, the respondent General Bond, ordered Captain Noyd confined to the United States Disciplinary Barracks at Fort Leavenworth, Kansas pending the results of his appeal. (GCMO 13). The order of confinement to Leavenworth led to the filing of a petition for a writ of habeas corpus in the United States District Court for the District of New Mexico. Only the order of the Federal District Court, entered on May 24, 1968, has prevented the execution of the Leavenworth confinement order.

Chief Judge Payne, in his decision in the District Court, recognized that any attempt to jail Captain Noyd prior to the completion of military appellate review would constitute a clear violation of Article 71(c) of the Uniform Code of Military Justice, since Article 71(c) forbids execution of a sentence which includes confinement of one year or more, prior to the completion of appellate review. Accordingly, he invalidated the attempt to incarcerate Captain Noyd at

Fort Leavenworth pending the completion of appellate review, 285 F. Supp. 785. See Appendix, *infra*, p. 12a.

Both sides appealed Judge Payne's decision to the Court of Appeals. Petitioner appealed from so much of Judge Payne's decision as declined to order his complete release from confinement pending completion of military appeals. Respondents appealed from so much of the decision of the District Court as partially granted the writ.

The Court of Appeals ruled below, however, that the District Court lacked the power to relieve petitioner from premature confinement at Leavenworth pending appeal because petitioner had "failed to exhaust his military remedies." The District Court was reversed. Opinion below, p. 6, *infra*, p. 6a.

This petition for certiorari seeks reversal of the decision of the Court of Appeals, and reinstatement of the decision of the District Court. It further seeks a direction to the District Court to modify its decision and order, and to direct the granting of the original habeas corpus petition in full.

Simultaneously with this petition for certiorari, petitioner is filing with the Circuit Justice an application for release from confinement pending certiorari.

Following Judge Payne's decision, the respondent Doerr ordered petitioner moved from his family quarters, to which he had previously been confined, to a room in a bachelor officer's quarters. The conditions of his confinement since then have remained substantially the same. They include: absolute restriction to his room except for authorized exits, at specific hours, and in each case with prior notification to

Security Police, to obtain meals and to take care of personal needs; restriction of exercise to one weekly period of 1½ hours; restriction of visiting by his wife and two infant children to two weekly visits of two hours each; all non-family visiting is restricted to one weekly one-hour period; a large sign is affixed to his door which reads "Off Limits to Military Personnel".

Reasons for Granting the Writ

Certiorari should be granted because the Court of Appeals decided important questions of Federal law which have not been but should be settled by this Court, and also because the jurisdictional holding of the Court of Appeals appears to conflict with applicable rulings of other Courts of Appeals.

POINT I

The Court of Appeals improperly applied the doctrine of exhaustion of military remedies, and thereby deprived petitioner of Federal habeas corpus relief, which is the only adequate, effective and practical remedy available. Its narrow jurisdictional holding is in conflict with decisions of other Courts of Appeals.

The Court of Appeals did not rule on the merits of petitioner's claim that he was ordered incarcerated in violation of military law.[2] Citing one Supreme Court decision, *Gusik*

[2] However, the citation by the Court of Appeals of three decisions of military Boards of Review, *U. S.* v. *Smith*, 2 CMR 817 (1952); *U. S.* v. *Banes*, 3 CMR 550 (1952); and *U. S.* v. *Lucero*, 18 CMR 942 (1955), all of which uphold petitioner's contention that such confinement is unlawful, strongly suggests that the Court of Appeals agreed with the District Court on the merits. See discussion of merits in Point II, *infra*.

v. *Schilder*, 340 U. S. 128 (1950), and a number of its own prior decisions, it declined jurisdiction on the grounds that petitioner had not exhausted all possible military remedies.[3]

(a) Inadequacy and ineffectiveness of suggested military remedies.

The possible military remedies which the Court below noted included review by an Air Force Board of Review;[4] further review, upon grant of petition therefor, by the Court of Military Appeals; and application for an extraordinary writ to the Court of Military Appeals.

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[3] The Tenth Circuit stated it to be "well established . . . that habeas corpus is not available to review military confinement until after all remedies afforded by the UCMJ have first been exhausted." Opinion below, p. 5, Appendix, *infra*, p. 4a. But in *Gusik* v. *Schilder*, *supra*, this Court's declination of jurisdiction on grounds of non-exhaustion was in response to a petition which sought review of various errors in the court-martial proceedings. *Gusik* was not, as is this case, an attack on the lawfulness of the confinement, unconnected with any possible trial errors. It may indeed be "well established" that habeas corpus is not available to review military *trials* until after exhaustion. But see argument, *infra*, at pp. 14-17. However, petitioner respectfully suggests that it is not at all well established that the bare question of military *confinement* itself—uncoupled with a collateral attack on judicial proceedings resulting in confinement—is not amenable to Federal habeas corpus. In any event, this Court has never so held in *Gusik* or in any other decision. Moreover, the decision below that a Federal court is powerless, pre-exhaustion, to redress a violation of Article 71(c) of the UCMJ is a case of first impression.

[4] The Court below's observation that the Board of Review had heard oral argument but not yet rendered its decision is inaccurate. Oral argument before the Board of Review was on August 22, 1968; its decision was handed down on September 3, 1968. Argument before the Court below was on October 2, 1968, and its decision was filed on October 30, 1968.

None of these suggested remedies can provide the adequate, effective and practical relief which is available through Federal habeas corpus. In the Board of Review decisions cited by the Court below, relief was indeed granted, but only after varying periods of unlawful incarceration while awaiting decision. In *U. S.* v. *Smith*, 2 CMR 817 (1952), the intervening period was 5½ months; in *U. S.* v. *Ranes*, 3 CMR 550 (1952), it was 2½ months; in this case, had the Board of Review reversed, it would have meant that petitioner would have nonetheless been illegally confined from March 9, 1968 to September 3, 1968, almost six months of a one-year sentence.

Federal habeas corpus relief, on the other hand, can be and in this case was, instantaneous and effective. GCMO 13, the Leavenworth confinement order, was issued May 10, 1968. Petitioner promptly obtained a show cause order from the District Court, which contained a stay. Briefs were presented, the matter was heard, and the Court rendered its decision on May 24, 1968, fourteen days after the confinement order.

The length of the record, the complexity of the issues, and the technical problems of preparing for a full appellate review on the merits are all factors which will bear on the length of illegal incarceration, if this were to be the only remedy. Utilization of this remedy would tend to pressure counsel for an unlawfully incarcerated accused to press for speedy review on the question of confinement and not take the time to adequately review, research and prepare for the other questions.

For obvious reasons, awaiting review on the merits by the Court of Military Appeals could not possibly produce

relief, in most cases, until approximately a year after conviction.[5]

The third suggested military remedy is the application for an extraordinary writ to the Court of Military Appeals in the light of its holding in *Levy* v. *Resor*, 37 CMR 399 (1967), that it has jurisdiction to hear such writs. But the Court below, we respectfully contend, overlooked a number of serious practical difficulties which would be created by establishing the Court of Military Appeals as the exclusive forum within which a military prisoner may challenge the lawfulness of his detention pending appeal:

(1) A jurisdictional requirement which funnels virtually all military habeas corpus applications through the Court of Military Appeals would place an extraordinary strain upon the facilities of that Court. The Court of Military Appeals is a three judge appellate tribunal. It lacks both the facilities and the manpower to accommodate the vast increase in evidentiary hearings which such a jurisdictional rule would entail. At the present time, the Court is obliged by the pressure of cases to regulate its appellate caseload by the judicious use of its discretionary power to grant review "upon petition of the accused and on good cause shown" UCMJ, Art. 67(b)(3); 10 U. S. C. §867(b)(3). To the extent that the Court is burdened as the primary forum from which military habeas corpus petitions must be launched, it will be correspondingly less able to fulfill its primary role of appellate tribunal.

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[5] The court-martial record of the five-day trial in this case consists of 402 pages, plus several hundred unnumbered pages of exhibits. Petitioner filed his petition for grant of review on November 22, 1968. If review is granted, by the time briefs are filed, oral argument is heard, and decision is rendered, Captain Noyd's one-year term will probably be over, even without giving effect to provisions for time off for good behavior.

(2) The very nature of a *habeas corpus* writ requires the presence of the petitioner at his hearing. However, it would be extremely impracticable for military authorities to transport prisoners great distances to Washington, D. C. to appear before the Court of Military Appeals.

(3) It will be virtually impossible for military prisoners to secure civilian counsel to initiate a writ in the Court of Military Appeals. It would be prohibitively expensive for a military prisoner detained in New Mexico or Hawaii, for example, to secure civilian counsel willing to travel to Washington, D. C. in order to initiate a habeas corpus proceeding.

(4) The Court of Military Appeals does not sit during the summer months. The very fact that the Court of Military Appeals recesses for the summer indicates that it does not view itself as the exclusive forum within which to initiate a habeas corpus writ challenging the legality of military detention.

As Chief Judge Payne observed in the District Court:

> ". . . the circumstances present here are such as to render the military remedy process ineffective to protect the petitioner's rights." 285 F. Supp. at 788. *Infra*, p. 11a.

This Court should grant certiorari, and reverse the decision below, because its narrow jurisdictional position, if allowed to stand, will have the effect of denying meaningful relief to large numbers of military prisoners.[6]

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[6] The United States Disciplinary Barracks at Fort Leavenworth, Kansas and many Air Force bases are located within the Tenth Circuit.

The relief sought by petitioner, if granted by this Court, will not be in circumvention of the military appellate process, but rather in support of it. What meaning is there to military appellate review if an accused languishes in confinement during its pendency, and when he is ultimately declared to have been unjustly convicted, his term has already been served? If there is here a lacuna in the administration of military justice, possibly susceptible of cure by legislation,[7] in the interim only Federal habeas corpus can provide effective justice and preserve the integrity of the military appellate process.

(b) Questionable applicability of exhaustion doctrine.

The only justification offered by the Tenth Circuit for its holding is the reinvocation of the doctrine of exhaustion of military remedies. It is questionable, however, if the doctrin is as monolithic as the Court below suggests. The doctrine as asserted in *Gusik* v. *Schilder,* 340 U. S. 128 (1950),[8] does not appear to have been reaffirmed by this Court in the succeeding eighteen years, notwithstanding

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[7] *Cf.* §2(24) of the Military Justice Act of 1968, which amends Article 54(a) of the UCMJ to allow discretionary deferment of the service of a sentence of confinement pending appellate review. The amendment becomes effective "on the first day of the tenth month following in the month in which it was enacted." §4(a). 37 U. S. Law W. 27, 29, 30.

[8] *Gusik* may very well be explained by the extraordinary conditions of military justice revealed in many of the early post-World War II cases. See *Servicemen in Civilian Courts,* 76 Yale L. J. 380, 383-385 (1966). A great public outcry against large-scale abuses led ultimately to the enactment of the Uniform Code of Military Justice in 1950. But one of the stopgap measures enacted by Congress was an amendment to the Articles of War which gave the Judge Advocate General of each service vast power to order new trials and grant other relief. Faced with this specific recent expression of congressional intent, it is not difficult to understand a judicial reluctance to disregard the new remedy.

many opportunities to do so. In *U. S. ex rel. Guagliardo* v. *McElroy*, 259 F. 2d 927 (D. C. Cir. 1958), aff'd 361 U. S. 281 (1960), the Court of Appeals held that the *Gusik* doctrine was of necessity greatly weakened by this Court's decisions in *Reid* v. *Covert*, 354 U. S. 1 (1957) and *U. S. ex rel. Toth* v. *Quarles*, 350 U. S. 11 (1955), and the Court concluded that *Gusik* must be limited to attempts "to attack collaterally a court-martial judgment because of alleged errors in the court-marital proceedings." 259 F. 2d at 929.[9] Obviously petitioner in this case does not seek habeas corpus to attack the many errors which he believes occurred in his court-martial proceedings. He is content to exhaust all his military remedies for the redress of those errors. Habeas corpus is sought so that if these errors are redressed in military channels, he will not have been deprived of this redress by intervening confinement.

There is little difference conceptually if the remedy which one is told he must exhaust prior to judicial review is an "administrative" remedy, or a "state court" remedy, or a "military" remedy. The wooden application of the doctrine can often have the effect, as in this case, of rendering a right remediless.

Indeed, it is now universally recognized that the doctrine that administrative remedies must be exhausted before resorting to the courts is not a rule of constitutional or even of statutory dimensions. It came into being simply as a point of judicial policy and convenience adopted by the courts and will not be applied in a hidebound fashion. This

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[9] *Accord*: *Neary* v. *Greenough*, 120 F. Supp. 833, 838 (D. Maine 1954); see *In re Yokoyama*, 170 F. Supp. 467 (S. D. Calif. 1959); *U. S. ex rel. Guagliardo* v. *McElroy*, 158 F. Supp. 171, 173 (D. D. C. 1958); see also *Caputo* v. *Sharp*, 282 F. Supp. 362 (E. D. Pa. 1968); *Peck* v. *Carpenter*, 120 F. Supp. 560 (N. D. Calif. 1954).

judge-made rule will be disregarded if there is good reason for making an exception. See *Natural Gas Pipeline Co.* v. *Slattery,* 302 U. S. 300 (1937); *Lockhart* v. *U. S.,* —— F. 2d ——, 37 U. S. Law W. 2269 (9th Cir., Oct. 23, 1968). "The statement that courts so often repeat in their opinions—that judicial relief must be denied until administrative remedies have been exhausted—is seriously at variance with the holdings." 3 Davis, *Administrative Law Treatise,* §20.01, at 56 (1958).

A major exception to the doctrine of exhaustion is recognized where it is clear that the administrative remedy is inadequate, as is the military remedy in this case. This Court applied such exception last term in the case of *NLRB* v. *Marine Workers,* 391 U. S. 418 (1968). See also *Greene* v. *U. S.,* 376 U. S. 149 (1964); *McNeese* v. *Board of Education,* 373 U. S. 668 (1963); 3 Davis, *supra,* §20.07.

Furthermore, this Court has refused to apply the doctrine of exhaustion where the administrative remedy is inadequate or ineffective because of the harm which would result due to delay on the part of the administrative agency. See *Smith* v. *Illinois Bell Telephone Co.,* 270 U. S. 587, 591-592 (1926) ("Property may be as effectively taken by long-continued and unreasonable delay in putting an end to confiscatory rates").

A second major exception to the doctrine of exhaustion has been applied by this Court where legal questions are presented which are of the type traditionally determined by courts and there is no requirement of administrative expertise. In *Gonzales* v. *Williams,* 192 U. S. 1 (1904), where the sole question before the Department of Immigration and Naturalization was whether or not the petitioner was an "alien", this Court held that there was no

requirement of exhaustion. Similarly, this Court, in *Public Utilities Commission* v. *United Fuel Gas Co.*, 317 U. S. 456 (1943), denied the applicability of the doctrine in a case attacking a state commission's orders as invalid, saying:

> "No inquiry beyond the orders themselves and the undisputed facts which underlie them is necessary in order to discover that they are in conflict with the federal Act." *Id.* at 469.

See also *Skinner & Eddy Corp.* v. *U. S.*, 249 U. S. 557 (1919); *U. S.* v. *Watkins*, 163 F. 2d 328 (2d Cir. 1947); *Lee County School District No. 1* v. *Gardner*, 263 F. Supp. 26 (D. S. C. 1967).

There are, in any event, increasing indications that this Court and other courts are critically examining the appropriateness of the invocation of the doctrine and its often harmful consequences. In *Fay* v. *Noia*, 372 U. S. 391 (1963) it was held that the doctrine of exhaustion of state remedies would not be allowed to defeat the manifest federal policy that federal constitutional rights cannot be denied without a full opportunity for federal judicial scrutiny.[10]

(c) Conflict between the circuits.

It is not surprising therefore that a conflict has developed between the circuits, or the question of whether the doctrine of exhaustion precludes Federal habeas corpus for American military personnel.

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[10] Likewise, the doctrine of exhaustion is held inapplicable to suits brought under the Civil Rights Act, 42 U. S. C. §1983 (1964). See *Damico* v. *California*, 389 U. S. 416 (1967); *McNeese* v. *Board of Education, supra; Monroe* v. *Pape*, 365 U. S. 167 (1961).

In *Noyd* v. *McNamara,* 378 F. 2d 538 (10th Cir. 1967), cert. den. 389 U. S. 1022 (1967), and again in *Noyd* v. *Bond,* below, the Court of Appeals for the Tenth Circuit adopted an extraordinarily restrictive view of the power and duty of the Federal courts in this area. The Tenth Circuit, in *Noyd* v. *McNamara, supra,* declined to rule on the merits of Captain Noyd's substantive defenses prior to his court-martial, and now in *Noyd* v. *Bond,* has prevented a Federal District Court from enjoining petitioner's premature incarceration pending appeal.

In *Hammond* v. *Lenfest,* 398 F. 2d 705 (2d Cir. 1968), however, the Second Circuit adopted a jurisdictional position squarely at variance with that of the Tenth Circuit. In *Hammond* v. *Lenfest, supra,* the Second Circuit ruled that a serviceman was not obliged to submit to a court-martial prior to raising his defense of conscientious objection in a Federal court. In so holding, the majority explicitly rejected the reasoning of the Tenth Circuit in *Noyd* v. *McNamara.* See also, *U. S. ex rel. Mankiewicz* v. *Ray,* 399 F. 2d 900 (2d Cir. 1968).

In *In re Kelly,* —— F. 2d ——, 37 U. S. Law W. 2165 (5th Cir., Aug. 30, 1968), the Fifth Circuit also explicitly rejected the reasoning of the Tenth Circuit in *Noyd* and chose to adopt the reasoning of the Second Circuit in *Hammond.* The Fifth Circuit stated:

> "In Noyd v. McNamara, 267 F. Supp. 701 (D. Colo. 1967), aff'd 378 F. 2d 538 (10th Cir. 1967), cert. den. 389 U. S. 1022 (1967), the Tenth Circuit considered the courts were without jurisdiction to entertain the suit pending exhaustion of military justice procedures. In Hammond v. Lenfest, 36 U. S. Law W. 2765 (2d

Cir., June 10, 1968), the Second Circuit, in a 2-1 decision, rejected Noyd and went the other way . . .

"We view the requirement of exhaustion as did the majority in Hammond. . . ."

See also *Powers* v. *Powers*, 400 F. 2d 438 (5th Cir. 1968); *Brown* v. *McNamara*, 387 F. 2d 150, 153, n. 5 (3d Cir. 1967), cert. den. 390 U. S. 1005 (1968).

Thus, a sharp conflict between the circuits exists as to the nature and extent of the duty of the Federal courts to entertain applications for writs of habeas corpus challenging the legality of military detention. In view of the extraordinary importance attached to the writ of habeas corpus as "the great writ of liberty",[11] petitioner respectfully urges that this Court issue a writ of certiorari to the Court of Appeals for the Tenth Circuit in order to clarify the delicate question of when, and under what circumstances, civilian courts may entertain applications for writs of habeas corpus challenging the legality of military detention.

In addition, the restrictive jurisdictional position of the Tenth Circuit ignored a well-established body of case law which upholds Federal habeas corpus jurisdiction to review the propriety of military post-conviction restraint. *Gibbs* v. *Blackwell*, 354 F. 2d 469 (5th Cir. 1965); *Levy* v.

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[11] The Chief Justice has observed that:

"When the authority of the military has such a sweeping capacity for affecting the lives of our citizenry, the wisdom of treating the military establishment as an enclave beyond the reach of civilian courts almost inevitable is drawn into question." Warren, *The Bill of Rights and the Military*, 37 N. Y. U. L. Rev. 181, 188 (1962).

Resor, —— F. Supp. —— (D. S. C. 1967), aff'd 384 F. 2d 689 (4th Cir. 1967), cert. den. 389 U. S. 1049 (1967); *Levy* v. *Dillon*, —— F. Supp. —— (L-543, D. Kans., July 29, 1968); see *Green* v. *Schilder*, 162 F. 2d 803 (10th Cir. 1947); *Kelly* v. *Hunter*, 80 F. Supp. 851 (D. Kans. 1948); *Sweet* v. *Taylor*, 178 F. Supp. 456 (D. Kans. 1959).

Finally, the Tenth Circuit's jurisdictional position casts doubt upon the well-established procedure of submitting to induction and challenging the validity of the induction order by an application for a writ of habeas corpus to the appropriate Federal District Court. See *Gibson* v. *U. S.*, 329 U. S. 338, 359 (1946); *Watkins* v. *Ruppert*, 224 F. 2d 47 (2d Cir. 1955). According to the rationale of the Tenth Circuit, such applications may not be heard in a Federal Court until the applicants have exhausted every conceivable military forum, including court-martial proceedings. See *Noyd* v. *McNamara, supra.* Such a result would be an unconstitutional suspension of the writ of habeas corpus. See *Gusik* v. *Schilder, supra*, 340 U. S. at 132; *Hammond* v. *Lenfest, supra*, 398 F. 2d at 713-714.[12]

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[12] By its characterization of military law as a "separate judicial establishment", Opinion below, p. 5, *infra*, p. 5a, the Tenth Circuit seems to be dealing with the concept of comity. However, comity is not a doctrine which asserts lack of power in jurisdictional terms, but merely a doctrine relating to the propriety of the exercise of power. Comity arises from the discretionary respect which one sovereign entity entertains for the acts of another. Consequently, no principle of comity can act to bar a Federal Court from inquiring into the lawfulness of the detention of any person by an instrumentality of the Federal Government itself. The military establishment is plainly not a sovereign entity. Judicial reluctance to entertain habeas corpus on misplaced notions of comity should be overruled by this Court.

POINT II

The incarceration of petitioner pending the completion of military appellate review is in acknowledged violation of the Uniform Code of Military Justice.

Article 71(c) of the Uniform Code of Military Justice, 10 U. S. C. §871, provides:

> "No sentence which includes, unsuspended, a dishonorable or bad-conduct discharge, or confinement for one year or more, may be executed until affirmed by a board of review and, in cases reviewed by it, the Court of Military Appeals."

Since petitioner was sentenced to one year's confinement and dismissal from the service, he clearly falls within the provisions of Article 71(c). Insofar as the "dismissal" aspects of his sentence are concerned, respondents have chosen to comply with Article 71(c) and have made no attempt to execute the dismissal. However, in disregard of the wording of Article 71(c), respondents have confined petitioner to quarters since March 9, 1968, and they seek to intensify his incarceration by attempting to imprison him in the United States Disciplinary Barracks at Fort Leavenworth, Kansas "pending the completion of appellate review," GCMO 13.

The District Court held, in its partial grant of the writ, that:

> "It is the opinion of the Court that placing the petitioner in Fort Leavenworth would, in effect, constitute, in part at least, execution of the sentence." 285 F. Supp. at 787. *Infra*, p. 9a.

Indeed, it would be difficult to conceive of a more effective "execution" of the confinement aspects of petitioner's sentence.[13]

In the numerous instances when this issue has arisen, military appellate tribunals have held that Article 71(c) prohibits the execution of a sentence of one year's confinement until the completion of appellate review.

In *U. S.* v. *Smith,* 2 CMR 817 (1952), the defendant was sentenced by a court-martial to one year's imprisonment and a bad conduct discharge. The convening authority approved the sentence and ordered the defendant to the United States Disciplinary Barracks at Cumberland, Pennsylvania, suspending only the bad conduct discharge pending appellate review. The Board of Review stated:

> "The action of the convening authority insofar as it purports to order into execution that portion of the approved sentence involving confinement, unsuspended, for twelve months is void." *Id.* at 822.

In *U. S.* v. *Ranes,* 3 CMR 550 (1952), *pet. for rev. den.* 3 CMR 150, the Air Force Board of Review was faced with a defendant who had been sentenced to a dishonorable discharge and confinement to the Base Guardhouse at Reese Air Force Base for one year. The convening authority approved the confinement and ordered it executed. The Air Force Board of Review stated:

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[13] The official review of the court-martial prepared by the Staff Judge Advocate of the convening authority (the respondent Bond) and concurred in and adopted by the respondent Bond explicitly designated the United States Disciplinary Barracks at Fort Leavenworth, Kansas as the "place of confinement."

"... the sentence of the court included confinement for one year and the convening authority purported to order this sentence into execution, suspending only the execution of the dishonorable discharge. The UCMJ, Article 71(c) provides, 'No sentence which includes, unsuspended, a dishonorable or bad-conduct discharge, or confinement for one year or more, may be executed until affirmed by a board of review and, in cases reviewed by it, the Court of Military Appeals.' The same prohibition is contained in §98 of the Manual for Courts Martial and is implicit in §88(d) of the Manual for Courts Martial ... Therefore, that part of the action of the convening authority purporting to direct execution of the sentence is illegal." *Id.* at 551.

The cases of *U. S.* v. *Sarae,* 9 CMR 633 (1953) and *U. S.* v. *Lucero,* 18 CMR 942 (1955) provide an excellent insight into the operation of Article 71(c) upon sentences of one year or more. In both cases, the defendants were convicted by court-martial and sentenced to a substantial fine, or, imprisonment of one year. In *Sarae,* the convening authority approved the sentence and ordered the confinement executed until the fine was paid. The Board of Review held that since the one year's confinement was not punitive, but merely to compel payment of a fine, 71(c) did not prohibit execution of confinement prior to appellate review. In *Lucero,* however, the Board reversed its decision in *Sarae,* and stated:

"It is inescapable that where there is the possibility that the sentence may extend to a year or more, the sentence may not be executed by the convening author-

ity until appropriate appellate review has been completed." *Id.* at 943.[14]

In *U. S.* v. *Hightower,* 14 CMR 908 (1954), the defendant was sentenced by a court-martial to one year's confinement and a dishonorable discharge. The convening authority approved the sentence and ordered it into execution. The Board stated:

> "The action of the convening authority in this case purports to order the sentence into execution. Since the sentence extended to a dishonorable discharge, total forfeitures and confinement at hard labor for one year, it cannot be ordered into execution until appellate review has been completed. Therefore, so much of the action as purports to order the sentence into execution is illegal, void and a nullity." *Id.* at 911.

In *U. S.* v. *Johnson,* 15 CMR 583 (1954), the Court stated:

> "So much of the action of the convening authority as purports to direct execution of the punishment of confinement and forfeitures is a nullity, since Article 71(c) of the Code forbids an order of execution as to any part of a sentence which includes confinement for one year or more until sentence has been affirmed by a Board of Review and . . . the Court of Military Appeals." *Id.* at 584.

Since Johnson's conviction was affirmed on the merits, it was held that no prejudice inured by virtue of the pre-

[14] The Court of Appeals, in its citation of the *Smith, Ranes,* and *Lucero* decisions, apparently agrees with this plain reading of Article 71(c). Opinion below, p. 6, *infra,* p. 5a.

mature execution of his sentence. However, in this case, the question of premature execution was raised at the inception of the appellate process. Therefore, the prejudice to petitioner is readily apparent, since even if he is ultimately successful on appeal, he would, nevertheless, have served the major portion of his sentence in illegal confinement.

On numerous other occasions, military courts have recognized that execution of a sentence of one year or more prior to appellate review is prohibited by Article 71(c) UCMJ. See, e.g., *U. S.* v. *O'Malley,* 1 CMR 469 (1951); *U. S.* v. *Duggins,* 1 CMR 539 (1951); *U. S.* v. *Johnston,* 2 CMR 759 (1952); *U. S.* v. *Mayer,* 3 CMR 667 (1952); *U. S.* v. *Ansell,* 16 CMR 450 (1954); *U. S.* v. *Williams,* 16 CMR 717 (1954); *U. S.* v. *Mason,* 16 CMR 795 (1954); *U. S.* v. *Garcia,* 17 CMR 88 (1954); *U. S.* v. *Doyle,* 17 CMR 542 (1954); *U. S.* v. *Emerson,* 20 CMR 434 (1954); *U. S.* v. *Lock,* 36 CMR 72 (1965).

We are thus faced with an issue of military law which has been consistently and uniformly determined in petitioner's favor by the military courts. The clear state of the military law on the subject renders the jurisdictional position of the Tenth Circuit even more difficult to comprehend. If a difficult and abstruse issue which had not been passed upon by any military court were present, a more compelling argument for "exhaustion" could be made. However, when faced with a well-settled proposition of military law, there is no justification for invoking the dubious doctrine of exhaustion and thereby frustrating the effective enjoyment of a right to be free. This Court should grant certiorari and declare its disfavor of what is in effect an abdication of judicial responsibility.

POINT III

The continued incarceration of Captain Noyd pending the completion of the military appellate process would deprive him of his liberty without due process of law in that no tribunal—civilian or military—has ever passed upon the merits of his defense.

Absolutely fundamental to a rational view of due process of law is the concept that no person may be sentenced *prior* to a hearing on his defense. However, by an unfortunate interaction between (1) *Noyd* v. *McNamara, supra;* (2) a violation of Article 71(c) of the Uniform Code of Military Justice; and (3) *Noyd* v. *Bond, supra,* Captain Noyd has been condemned to serve virtually his entire sentence to confinement *prior* to his receiving any hearing on the merits of his constitutional defenses. A brief summary of Captain Noyd's strange odyssey through the courts demonstrates that although he has served approximately nine months of his sentence, no court, civilian or military, has ever accepted jurisdiction and ruled on the merits of his defenses.

Initially, Captain Noyd approached the United States District Court in Denver, Colorado in March, 1967, when he was an Assistant Professor of Psychology at the Air Force Academy. Captain Noyd explained that he believed his application for conscientious objector status had been unconstitutionally and unlawfully rejected by the Air Force and that he was about to receive an order which would violate his religious beliefs. Judge Doyle initially granted a preliminary injunction, staying the Air Force from placing Captain Noyd in a position where he would be forced to disobey such an order. *Noyd* v. *McNamara,* —— F. Supp.

—— (Mar. 29, 1967). See Appendix, *infra*, p. 30a. However, several weeks later, Judge Doyle dissolved the injunction and dismissed the complaint, ruling that Captain Noyd should submit his defense to a court-martial before seeking the aid of a Federal District court. Judge Doyle's opinion was affirmed by the Tenth Circuit, which held that Captain Noyd "has not exhausted the military process and has not been denied, nor can we anticipate that he will be denied, a full consideration of his constitutional rights within the complete scope of that process." 378 F. 2d 538, 539-540 (10th Cir. 1967). This Court denied certiorari, 389 U. S. 1022 (1967). In the Memorandum in Opposition to the grant of certiorari, the Solicitor General of the United States argued:

> ". . . if and when petitioner is actually confronted with an order and charged with disobedience of it, he will have the opportunity to present his defenses within the traditional framework of court-martial procedures, review boards, resort to the service Secretary, and request for relief from the Court of Military Appeals." *Memorandum for the United States in Opposition*, p. 4.

Shortly thereafter, petitioner was indeed confronted with an order which conflicted with his conscience, charged with disobedience and found himself before a General Court-Martial at Cannon Air Force Base, Clovis, New Mexico. Captain Noyd attempted most strenuously to present his constitutional defenses to his court-martial. But the Law Officer ruled that, notwithstanding the understanding of the Tenth Circuit and the assurances of the Solicitor General, a military court-martial did not possess jurisdiction to determine petitioner's defenses. See *U. S.* v. *Noyd*, Record of Trial, p. 327.

The decision of the court-martial was affirmed by an Air Force Board of Review, which also disclaimed the power to determine petitioner's constitutional defense. In its decision the Air Force Board of Review stated:

> "Our decision in ACM 20016, *Dunn*, —— CM12 ——, decided May, 1968, answers the contention that the Secretary of the Air Force made an error of law in denying the accused's applications under AFR 35-24 for classification as a conscientious objector. In *Dunn*, the defense likewise demanded a judicial review within the court martial system of a Secretarial determination that the accused was not entitled to an administrative discharge as a conscientious objector. We held:
>
> > 'The obvious answer is that such judicial review was not within the jurisdiction of the court martial which tried the accused. The jurisdiction of a court martial is a very limited jurisdiction derived from the power of the Congress, in Article I, Section 8, Clause 14, of the Constitution To make Rules for the Government and Regulation of the land and naval Forces.' [citation omitted]
>
> "'. . . it is the Federal, not the military, courts which have jurisdiction in a proper case to review proceedings under such military regulations to determine whether there has been substantive due process." [citations omitted][15] *U. S.* v. *Noyd, infra,* p. 21a.

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[15] The Board cited with approval *Hammond* v. *Lenfest,* 398 F. 2d 705 (2d Cir. 1968) which rejected the reasoning and disagreed with the holding of the Tenth Circuit in *Noyd* v. *McNamara, supra.*

Thus, while the civilian and military courts have mutually and respectfully deferred to each other, "as nimbly as if dancing a quadrille," *Orloff* v. *Willoughby*, 345 U. S. 83, 87 (1953), petitioner was ordered to serve his sentence at Fort Leavenworth *before* any court passes upon the merits of his defenses. Petitioner has been subjected to an exercise in judicial frustration which may be summarized as follows:

(1) the refusal of the Tenth Circuit to permit a decision on the merits of his case until the military courts have acted—*Noyd* v. *McNamara*, 378 F. 2d 538 (10th Cir. 1967), cert. den. 389 U. S. 1022 (1967);

(2) the refusal of the military courts to render a decision on the merits of his case because they feel they lack the power to do so—*U. S.* v. *Noyd*, ACM 20121, —— CMR ——, *infra*, pp. 20a-23a;

(3) the insistence of the military authorities upon incarcerating petitioner at Fort Leavenworth pending the completion of the military appellate process—GCMO 13, *infra*, p. 14a; and

(4) the refusal of the Tenth Circuit to permit Federal habeas corpus review to prevent petitioner's unlawful incarceration pending appeal—*Noyd* v. *Bond*, —— F. 2d ——, *infra*, pp. 1a-6a.

Petitioner, therefore, has been sentenced to serve a year in confinement, and will in fact, serve that year, without *any* tribunal ever having passed upon the merits of his

defense,[16] unless this Court grants certiorari and orders him released pending certiorari.[17]

The responsibility of the Federal Courts to prevent the occurrence of the bizzare procedural dilemma in which petitioner has been placed is manifest. Petitioner respectfully urges this Court to grant certiorari in order to relieve him from the burden of being obligated to serve his sentence *prior* to receiving any hearing on the merits of his defense. At the same time a grant of certiorari will clarify the broader question of the power of the military to incarcerate a prisoner pending appeal, under any circumstances where military courts refuse to consider legal defenses on asserted grounds of lack of jurisdiction.

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[16] Presumably the doctrine of exhaustion of military remedies will no longer be applicable after the Court of Military Appeals rules, and it may then be possible to obtain judicial review on the merits. Cf. *Burns* v. *Wilson*, 346 U. S. 137 (1953). But by that time the one-year sentence will have been served.

[17] Simultaneously with this petition, petitioner has filed an application for release from confinement pending certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: December 10, 1968.

APPENDIX.

APPENDIX

Opinion of the Court of Appeals, Tenth Circuit
Filed October 30, 1968

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

September, 1968, Term

Number 13-68

CAPTAIN DALE E. NOYD,

Appellant,

vs.

MAJOR GENERAL CHARLES R. BOND, JR., Commander, Twelfth Air Force, United States Air Force; COLONEL GEORGE R. DOERR, Commander, 832nd Combat Support Group, and Commander, Cannon Air Force Base, New Mexico; COLONEL ROBERT R. SCOTT, Commander, 832nd Air Division, Cannon Air Force Base, New Mexico; COLONEL JIMMY J. JUMPER, Commander, 27th Tactical Fighter Wing, Cannon Air Force Base, New Mexico; LIEUTENANT COLONEL JAMES L. GLESSNER, JR., Commander, 524th Tactical Fighter Squadron, Cannon Air Force Base, New Mexico; CAPTAIN CHARLES THOMPSON, Commander, 832nd Security Police Squadron, Cannon Air Force Base, New Mexico,

Appellees.

Number 14-68

CAPTAIN DALE E. NOYD,

Cross-Appellee,

vs.

MAJOR GENERAL CHARLES R. BOND, JR., Commander, Twelfth Air Force, United States Air Force; COLONEL GEORGE R. DOERR, Commander, 832nd Combat Support Group, and Commander, Cannon Air Force Base, New Mexico; COLONEL ROBERT R. SCOTT, Commander, 832nd Air Division, Cannon Air Force Base, New Mexico; COLONEL JIMMY J. JUMPER, Commander, 27th Tactical Fighter Wing, Cannon Air Force Base, New Mexico; LIEUTENANT COLONEL JAMES L. GLESSNER, JR., Commander, 524th Tactical Fighter Squadron, Cannon Air Force Base, New Mexico; CAPTAIN CHARLES THOMPSON, Commander, 832nd Security Police Squadron, Cannon Air Force Base, New Mexico,

Cross-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

(District Court Number 7580)

Marvin M. Kafpatkin, New York, New York (John DeJ. Pemberton, Burt Neuborne, New York, New York, Paul A. Phillips and F. Willard Kitts, Albuquerque, New Mexico, on the brief) for Appellant and Cross-Appellee.

John Quinn, United States Attorney, Albuquerque, New Mexico (John A. Babington, Assistant United States Attor-

ney, Albuquerque, New Mexico, on the brief) for Appellees and Cross-Appellants.

Before PHILLIPS, HILL and SETH, United States Circuit Judges.

HILL, Circuit Judge.

On March 8, 1968, Dale E. Noyd, a captain in the United States Air Force, was convicted by a general court-martial of violating Article 90 of the Uniform Code of Military Justice in that he wilfully disobeyed a lawful military order. He was sentenced to dismissal from the service, forfeiture of all pay and allowances and confinement for one year at hard labor. On May 10, 1968, the general court-martial convening authority, General Charles R. Bond, approved the conviction and ordered Noyd removed to the United States Disciplinary Barracks at Fort Leavenworth, Kansas, pending completion of military appellate review. Before the transfer order could be carried out, this petition for habeas corpus was filed in the federal district court of New Mexico. The petition asserted the foregoing facts and sought either release on bail or, in the alternative, maintenance of the pre-existing condition of confinement, namely, arrest in quarters at Cannon Air Force Base, Clovis, New Mexico.

The district court determined that to allow the transfer to Fort Leavenworth would be tantamount to an execution of the sentence prior to the completion of military review procedures. This being prohibited by Article 71(c) of the Uniform Code of Military Justice (UCMJ),[1] it was decreed

[1] Article 71(c) of the Uniform Code of Military Justice provides: "No sentence which includes, unsuspended, a dishonorable or bad conduct discharge, or confinement for one year or more, may be

that appellant be relieved from said order. Pursuant to the court's directive, the Air Force rescinded the transfer order and directed that appellant be placed under guard and restricted to a room in the Visiting Officer's Quarters at Cannon Air Force Base. Both parties being dissatisfied with the disposition of the matter as it presently stands, this appeal followed.

At the outset we are faced with the familiar question of exhaustion of military remedies. Under well established military appellate procedure, appellant is entitled to obtain a review of his conviction by an Air Force Board of Review and, if a petition for review is granted, by the United States Court of Military Appeals. At the present time, the Board of Review has heard oral argument although no decision has yet been rendered. Thus, it is apparent that the military appellate procedures have not been pursued to finality.

It is well established, not only in this court[2] but by the United States Supreme Court[3] that habeas corpus is not available to review military confinement until after all remedies afforded by the UCMJ have first been exhausted. The policy underlying the requirement of exhaustion of state remedies applies with equal force to attacks upon the propriety of military confinement. Military law and

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executed until affirmed by a board of review and, in cases reviewed by it, the Court of Military Appeals." 10 U.S.C. § 871(c).

[2] Noyd v. McNamara, 378 F.2d 538 (10th Cir. 1967), cert. den. 389 U.S. 1082; Gorko v. Commanding Officer, 314 F.2d 858 (10th Cir. 1963); McKinney v. Finletter, 205 F.2d 761 (10th Cir. 1953); Hunter v. Beets, 180 F.2d 101 (10th Cir. 1950), cert. den. 339 U.S. 963; and McMahan v. Hunter, 179 F.2d 661 (10th Cir. 1950), cert. den. 339 U.S. 968. See Annot., 15 A.L.R. 2d 387 (1949).

[3] Gusik v. Schilder, 340 U.S. 128 (1950).

state law both exist substantially independent and apart from the law governing the federal courts. All three separate judicial establishments necessarily reflect the effects of diverse functions. For this court to intervene in military matters prior to the full utilization of all means of rectification provided by that separate entity might well constitute a needless interference with the procedures established to police the errors of that tribunal. Accordingly, if an available procedure has not been employed to permit the military to correct an alleged deficiency it is not for this court to undertake an untimely intervention.

Admittedly, appellant does not now attempt to collaterally attack the judgment of the court-martial on the merits. He seeks instead to obtain relief from his detention pending military appeal. Nonetheless, it is clear that this issue can be raised in the same manner on appeal to the proper military tribunal as if it related to any other failure to fully comply with the UCMJ.[4] Indeed, the Court of Military Appeals has recently held that it possesses the power to issue a habeas corpus writ in circumstances such as these.[5] Hence, it cannot be gainsaid that through a proper utilization of the review procedures established by the UCMJ appellant can raise the same issues presented here without going outside the system which initially, and at all times heretofore, has had the primary responsibility for his present confinement. As a result, available military review procedures remain to be utilized. We conclude,

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[4] E.g., United States v. Smith, 2 CMR 817 (1952); United States v. Ranes, 3 CMR 550 (1952); United States v. Lucero, 18 CMR 942 (1955); and United States v. Lock, 36 CMR 72 (1965).

[5] Levy v. Resor, 37 CMR 399 (1967).

therefore, that appellant has failed to exhaust his military remedies.[6]

The order of the district court in granting partial relief is therefore vacated and the judgment is REVERSED.

[6] This court in requiring that appellant first exhaust all available military remedies, does so after fully recognizing that "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment." Burns v. Wilson, 346 U.S. 137, 140 (1953).

Opinion of the District Court, District of New Mexico, Dated May 24, 1968

UNITED STATES DISTRICT COURT

DISTRICT OF NEW MEXICO

Civ. No. 7560

CAPTAIN DALE E. NOYD,

Petitioner,

—v.—

MAJOR GENERAL CHARLES R. BOND, JR., Commander, Twelfth Air Force, United States Air Force, et al.,

Respondents.

DECISION AND ORDER

PAYNE, Chief Judge.

This cause came on for hearing on the 23rd day of May, 1968, at 10:00 a.m., on an Order to Show Cause issued by this Court on May 16, 1968, requiring the respondents to show cause why a writ of habeas corpus should not issue herein as prayed for in the petition. The petitioner was present in person and by his attorneys. The petitioner was represented by Marvin M. Karpatkin and other attorneys. The respondents were represented by the Honorable John Quinn, United States Attorney, and others. No testimony was taken, but each side argued the case at length. Since no opposing testimony was offered, the Court took the petition to be true, and this opinion is based upon such facts.

It may be noted at the outset that the function of a Federal District Court in a case such as this is not to re-evaluate the evidence and make a determination of the petitioner's guilt or innocence. The extent to which this Court should inquire into this matter has been defined by the Tenth Circuit as follows:

> "(1) The scope of judicial review of military habeas corpus cases is well established. Court inquiry is limited to whether the court-martial had jurisdiction of the person and the offense charged, whether the accused was accorded due process of law as contemplated and assured by the Uniform Code of Military Justice, and whether competent military tribunals gave fair and full consideration to all the procedural safeguards deemed essential to a fair trial under military law."

Gorko v. Commanding Officer, 314 F.2d 858 (1963). In Kennedy v. Commandant, 10 Cir., 377 F.2d 339, the same court, speaking through Chief Judge Murrah, reiterated the above expressed formula.

The facts presented by this case are as follows: Petitioner was convicted by a general court-martial for violation of Article 90 of the Uniform Code of Military Justice for a willful violation of a lawful order. This conviction occurred at Cannon Air Force Base near Clovis, New Mexico, and the judgment of the conviction was rendered on March 8, 1968. The petitioner was sentenced to dismissal from the service, forfeiture of all pay and allowances, and one year of confinement at hard labor, and on May 10, 1968, General Bond approved the findings and sentence of such general court-martial and directed that

the petitioner be transferred to the United States Disciplinary Barracks at Fort Leavenworth, Kansas.

Article 71(c) of the Uniform Code of Military Justice (10 U.S.C. § 871(c)) reads as follows:

> "(c) No sentence which includes, unsuspended, a dishonorable or bad-conduct discharge, or confinement for one year or more, may be executed until affirmed by a board of review and, in cases reviewed by it, the Court of Military Appeals."

There is a disagreement as to whether petitioner's incarceration at Fort Leavenworth would be for the sole purpose of safekeeping, or whether it would be considered execution of his sentence. It is the opinion of the Court that placing the petitioner in Fort Leavenworth would, in effect, constitute, in part at least, execution of the sentence. Petitioner's sentence includes a term of confinement for one year, and the Court holds that the respondents cannot execute such sentence until such review procedures as are mentioned in Article 71(c) are completed.

Respondents contend that Article 57 of the Uniform Code of Military Justice (10 U.S.C. § 857), specifically subsection (b), which provides that "any period of confinement included in a sentence of a court-martial begins to run from the date the sentence is adjudged by the court-martial * * *", permits or requires confinement of petitioner in the manner attempted. The Court disagrees with this contention. Article 57 is of a general nature, and it seems to the Court that Article 71 creates specific exceptions to the application of Article 57. Furthermore, if these sections are indeed to some degree incompatible, the Court believes that any such conflict should be resolved in the petitioner's favor.

The Court has concluded that it has no jurisdiction to tell the respondents what conditions of restraint may be imposed upon the petitioner, or what conditions of release, if any, might be imposed. The Bail Reform Act of 1966 specifically excludes offenses of the type involved here from the jurisdiction of the district courts. The case of Levy v. Resor, et al., 17 U.S.C.M.A. 135, 37 C.M.R. 99, holds that the right of a person in the military service to bail pending appeal from conviction is not constitutional, but statutory only, and that, in the military, there is no statutory provision for such bail. This Court agrees with that decision, and concludes that it has no right to say what bail, if any, should be set for the petitioner, nor to state what conditions of release, if any, should be imposed. Those are matters that are properly within the discretion of the military authority, and it may be that the appropriate officials will feel that the petitioner should be confined during the review procedures. This Court is not attempting to rule on any of those questions. The Court merely holds that sending the petitioner to Fort Leavenworth would, in effect, amount to execution of the sentence.

It has traditionally been held that a writ of habeas corpus is unavailable to question a sentence to be served in the future. In Rowe v. Peyton, 383 F.2d 709 (4th Cir., 1967), however, the Fourth Circuit observed that since McNally v. Hill, 293 U.S. 131, 55 S.Ct. 24, 79 L.Ed. 238, the Supreme Court has adopted a more liberal, less technical concept of the writ, and the Court concluded that a writ might be granted concerning a sentence to be served in the future.

The Fourth Circuit in *Rowe* felt that the Federal habeas corpus writ was available "to serve the clearly present

need of a procedural device to test the legality of these convictions (which involved sentences to be served in the future) • • • " 383 F.2d 709, 710.

The petitioner in the present case has not yet been incarcerated at Fort Leavenworth; however, an order has been issued requiring him to go there, and the Court believes that a present need exists to test the legality of such order.

An important question raised by this proceeding is whether this action is premature in view of the fact that the petitioner has not exhausted his military remedies. The Court is familiar with the exhaustion principle, and the wording of the judicial code which codifies this principle, 28 U.S.C.A. § 2254. "The policy underlying that rule is as pertinent to the collateral attack of military judgments as it is to collateral attack of judgments rendered in state courts." Gusik v. Schilder, 340 U.S. 128, 131, 132, 71 S.Ct. 149, 151, 95 L.Ed. 146.

It is the Court's opinion that the circumstances present here are such as to render the military remedy process ineffective to protect the petitioner's rights. In view of the determination on the part of the Air Force to execute petitioner's sentence before completion of the prerequisites to execution of sentence provided by Article 71(c), U.C. M.J., the Court has concluded that the circumstances warrant a partial granting of the writ requested notwithstanding petitioner's failure at this point to have exhausted his military remedies. 28 U.S.C.A. § 2254(b). To require petitioner to await completion of the appellate review process would be to permit execution of his sentence. Such would constitute a deprivation of petitioner's rights under the Uniform Code of Military Justice, Article 71(c).

It is the Court's ruling that (1) the order confining petitioner to Fort Leavenworth constitutes execution of his sentence and is void, and (2) the Court has no jurisdiction or authority to interfere with the discretion of the military establishment concerning petitioner's custody, so long as such discretion is exercised within the framework of the Uniform Code of Military Justice.

It is, therefore, ordered and adjudged that the petitioner be, and he is hereby, relieved from the order requiring him to go to the disciplinary barracks at Fort Leavenworth, Kansas.

General Court-Martial Order No. 13

DEPARTMENT OF THE AIR FORCE

HEADQUARTERS TWELFTH AIR FORCE (TAC)

Waco, Texas 76703

GENERAL COURT-MARTIAL ORDER
NUMBER 13

10 May 1968

Before a General Court-Martial which convened at Cannon Air Force Base, New Mexico, pursuant to Special Order C-2, Headquarters Twelfth Air Force (TAC), 17 January 1968, was arraigned and tried:

CAPTAIN DALE E. NOYD, FR28084, United States Air Force, 524th Tactical Fighter Squadron

CHARGE: Violation of the Uniform Code of Military Justice, Article 90

Specification: In that CAPTAIN DALE E. NOYD, United States Air Force, 524th Tactical Fighter Squadron, 27th Tactical Fighter Wing, Cannon Air Force Base, New Mexico, having received a lawful command from Colonel Homer K. Hansen, his superior officer, "To perform duties as instructor pilot tomorrow, 5 December 1967, as scheduled," did, at Cannon Air Force Base, New Mexico, on or about 5 December 1967, willfully disobey the same.

PLEAS: To the Charge and Specification: Not guilty

FINDINGS: Of the Specification and Charge: Guilty

SENTENCE: To be dismissed from the service, and to forfeit all pay and allowances, and to be confined at hard labor for one year. (No previous convictions considered.)

DATE ADJUDGED: The sentence was adjudged on 9 March 1968.

ACTION BY CONVENING AUTHORITY

DEPARTMENT OF THE AIR FORCE, HEADQUARTERS TWELFTH AIR FORCE (TAC), Waco, Texas, 10 May 1968

In the foregoing case of CAPTAIN DALE E. NOYD, FR28084, United States Air Force, 524 Tactical Fighter Squadron, the sentence is approved. The forfeitures shall apply to pay and allowances becoming due on and after date of this action. The record of trial is forwarded to The Judge Advocate General of the United States Air Force for review by a board of review. Pending completion of appellate review, the accused will be confined in the United States Disciplinary Barracks, Fort Leavenworth, Kansas.

/s/ Charles R Bond Jr.
CHARLES R. BOND, JR., Maj. Gen, USAF
Commander

FOR THE COMMANDER

[SEAL]

EDWARD D SMITH, Lt Col, USAF
Director of Admin Services

Opinion of the Air Force Board of Review

DEPARTMENT OF THE AIR FORCE

OFFICE OF THE JUDGE ADVOCATE GENERAL

Washington, D. C.

In the Board of Review, United States Air Force

Before

WILSON, *Chairman*, BOUCHER and TORVESTAD, *Members*

Judge Advocates

AFJAMA-2 ACM 20121

UNITED STATES

—v.—

Captain DALE E. NOYD, FR28084,
524th Tactical Fighter Squadron

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3 September 1968

TWELFTH AIR FORCE (TAC)

Sentence adjudged 9 March 1968 by GCM convened at Cannon Air Force Base, New Mexico. Approved sentence: Dismissal from the service, forfeiture of all pay and allowances, and confinement at hard labor for one (1) year.

Appearances:

Mr. Marvin M. Karpatkin and Mr. John deJ. Pemberton, Jr., New York, New York, Colonel Dwight R. Rowland, Colonel Joseph E. Krysakowski and Lieutenant Colonel Leonard Eichner, appellate counsel for the accused;

Colonel James R. Thorn and Major Robert L. Bates, appellate counsel for the United States.

Tried by a general court-martial convened at Cannon Air Force Base, New Mexico, the accused was found guilty of willfully disobeying the lawful command of his superior officer, in violation of Article 90 of the Uniform Code of Military Justice. He was sentenced to dismissal, forfeiture of all pay and allowances, and confinement at hard labor for one year. The convening authority designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement pending completion of appellate review.[1]

The specification of which accused stands convicted is as follows:

> "In that [accused] . . . having received a lawful command from Colonel Homer K. Hansen, his superior officer, 'To perform duties as instructor pilot tomorrow, 5 December 1967, as scheduled,' did, at Cannon Air Force Base, New Mexico, on or about 5 December 1967, willfully disobey the same."[2]

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[1] The designation of the United States Disciplinary Barracks as the place of confinement pending completion of appellate review is under collateral attack (Noyd v. Bond, Civil No. 7560, —— F. Supp. ——, decided 24 May 1968 (DC NMex 1968), appeal and cross-appeal pending).

[2] Although the order was one to be obeyed *in futuro*, the evidence establishes that accused stated that he would not obey it and he carried out his intention (MCM, 1951, para. 169*b*; CM 349288, Cunningham, 2 CMR 466).

The principal defense advanced by the accused is that the Secretary of the Air Force made an error of law in disapproving the accused's two applications under Air Force Regulation 35-24, DISPOSITION OF CONSCIENTIOUS OBJECTORS, for classification as a conscientious objector and either separation or reassignment as a conscientious objector.

The facts are uncontested. In brief, the accused participated in the Air Force ROTC program at Washington State University for four years and in 1955 graduated as a distinguished military graduate. He then accepted a regular Air Force commission and has been on continuous active duty since that time. He received pilot training and is presently a senior pilot. At the expense of the Air Force he was a graduate student at the University of Michigan for three years and received a masters degree. He also completed the academic study necessary for a Ph.D degree. In return for the Air Force financing his graduate study, he committed himself to serve until June 1969.

In 1966, while a member of the faculty of the Air Force Academy, the accused developed a belief in ethical or religious "humanism", and decided that the conflict in Vietnam is unjust and immoral. He determined to refuse to fight in that conflict, if ordered to do so, but that he would accept assignments to duty consistent with his conscience. He subsequently tendered his resignation under the provisions of AFR 36-12, ADMINISTRATIVE SEPARATION OF COMMISSIONED OFFICERS AND WARRANT OFFICERS OF THE AIR FORCE. The Secretary of the Air Force refused to accept the resignation. The accused then submitted the first of two applications under AFR 35-24 for classification as a conscientious objector and either separation or reassignment as a conscientious objector. This application was disapproved by the Secretary of the Air Force.

The accused thereupon commenced an action in a Federal district court seeking declaratory relief, an injunction, and writs of habeas corpus and mandamus. The accused asked for substantially the same relief which had been denied him in his application under AFR 35-24. The district court ordered the action dismissed for lack of jurisdiction (Noyd v. McNamara, 267 F Supp 701 (DC Colo 1967), affd 378 F2d 538 (10th Cir 1967), cert. den. 389 US 1022, 19 L Ed 2d 667, 88 Sup Ct 593).

After the adverse decision in the district court, the accused, who had theretofore been transferred to Cannon Air Force Base, New Mexico, filed his second application under AFR 35-24. In August, 1967, the Secretary likewise disapproved this application.

The circumstances surrounding the offense of which accused stands convicted are concisely set forth in a statement, admitted in evidence as a defense exhibit, of the superior officer named in the specification. It accurately summarizes his sworn testimony at the trial:

> "After I had given Captain Noyd a direct order at 1115 hours, 4 December 67, to fly as scheduled, I released him to return to the squadron. Upon return the Commander of the 524TFS, Lt Colonel James L Glessner, excused him, at his request, to take care of personal matters to wit; visit the legal office. As a consequence, I requested he be informed of the flight schedule of 5 December which ordered him to fly as instructor in an F-100F with a student. Further, I requested he return to see me at 1545 on 4 December at which time I stated:
>
> 'I understand your squadron commander approved your request at noon for time to take care of personal

matters. This occurred after I had given you a direct order to comply with the flight schedule which assigned you to a training flight in an F-100F with 2nd Lt Matthew A Husson with takeoff at 1310.

'As a consequence, I am giving you a direct order to perform duties as instructor pilot tomorrow, 5 December, as scheduled. As I stated previously, I am aware of your conscientious beliefs with regard to performing duties as an instructor pilot, your application to be classified as a conscientious objector which has been denied and that you have taken this matter up with the federal courts and that you are awaiting a decision by the Supreme Court of the United States.

'Until such time the federal courts render a decision favorable to you, you are still required to perform proper military duties assigned to you and obey all lawful orders given to you and that your failure to do so can conceivably result in trial by General Courts-Martial. I am not desirous in resorting to such course of action, and therefore, I am giving you a direct order to perform duties as instructor pilot as scheduled. I have nothing further to add.'

"Captain Noyd stated that after he had declined to fly he thought it was clear to everyone that he was not following orders. Further he stated that he fully understood what I had stated and asked if there was anything more, saluted, and left."

The accused testified that he "knew in advance" that he could not obey the order; that at the time he was not suffering from any mental disease, or derangement of a nature

that could have prevented him from knowing the difference between right and wrong and adhering to the right; and that the violation of the order was a conscious, voluntary choice on his part. He also testified that, "In a sense I would say I had no choice, because I felt that it was what I must do".

After the trial, individual defense counsel assigned 18 errors and presented oral argument to the Staff Judge Advocate. The allegations of error were extensively discussed in the competent and scholarly review of the Staff Judge Advocate and resolved adversely to the accused. Appellate defense counsel have assigned 19 errors, 18 of which are identical with those assigned and argued below and resolved in the review. We agree with the Staff Judge Advocate's disposition of these allegations and adopt his conclusions, with the further discussion set forth hereinafter. As to the remaining assigned error submitted by appellate defense counsel, we find that it is entirely without merit and requires no discussion.

Our decision in ACM 20016, Dunn, —— CMR ——, decided 1 May 1968, answers the contention that the Secretary of the Air Force made an error of law in denying the accused's applications under AFR 35-24 for classification as a conscientious objector. In *Dunn,* the defense likewise demanded a judicial review within the court-martial system of a Secretarial determination that the accused was not entitled to an administrative discharge as a conscientious objector. We held:

> "The obvious answer is that such judicial review was not within the jurisdiction of the court-martial which tried the accused. The jurisdiction of a court-martial is a very limited jurisdiction derived from the power of the Congress, in Article I, Section 8, Clause

14, of the Constitution 'To make Rules for the Government and Regulation of the land and naval Forces' (Reid v. Covert, 354 US 1, 1 L Ed 2d 1148, 77 Sup Ct 1222). In its exercise of this power, the Congress did not include in the Uniform Code of Military Justice a grant of jurisdiction to military tribunals to review such administrative determinations.

"Voluntarily enlisted servicemen are a distinct class from inducted civilians. Military regulations providing a procedure for voluntarily enlisted servicemen to request discharge on the ground of conscientious objection reached after enlistment do not deny procedural due process or equal protection under the Constitution. And it is the Federal, not the military, courts which have jurisdiction in a proper case to review proceedings under such military regulations to determine whether there has been substantive due process (Brown v. McNamara, 387 F 2d 150 (3rd Cir 1967) [cert. den. sub nom. Brown v. Clifford, 390 US 1005, 20 L Ed 2d 105, 88 Sup Ct 1244])." (*Dunn*, supra, at p. ——).

It is not within our province to suggest at what stage a question of substantive due process in proceedings under AFR 35-24 may be ripe for adjudication in the Federal courts. In this connection, we observe that in *Noyd*, supra, the Court of Appeals, in affirming the order of the district court dismissing the action for lack of jurisdiction, held that:

"The *essence* of appellant's claim is that the Federal judiciary should review and determine the validity of military assignments to duty. This we cannot do." (378 F 2d, at p. 540). (Emphasis added).

We also observe that in a recent military habeas corpus case involving a conscientious objector claim, Hammond v. Lenfest, No. 31909, —— F 2d —— (2d Cir), decided 10 June 1968, the court stated:

> "Principal reliance is placed [by the Government] upon the recent decision in Noyd v. McNamara, 267 F. Supp. 701 (D. Colo.), aff'd, 378 F. 2d 538 (10th Cir.), cert. denied, 389 U.S. 1022 (1967), in which the District Court refused to examine the conscientious objector claim of an Air Force captain with 11 years' service who was not a 'total pacifist' but was merely opposed 'to the war that this country is waging in Vietnam.'" 267 F. Supp. at 703-04. It is possible to read Noyd as nothing more startling than an application of the settled doctrine that the federal courts will not interfere with duty assignments of persons lawfully in the armed forces, Orloff v. Willoughby, 345 U.S. 83 (1953). See Crane v. Hedrick, —— F. Supp. ——, —— (N.D. Cal. 1968). To the extent that Noyd might suggest that a court martial is a prerequisite for federal court review of the claim that the petitioner, at the time of bringing suit, is not lawfully in the armed forces, we reject its reasoning. For several sufficient reasons we hold that Hammond's claim is now ripe for adjudication.
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> . . . . . .
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> "Furthermore, Hammond contends—and the government does not assure us otherwise—that a court martial would consider itself bound by the determination of the Chief of Naval Personnel and would not entertain a challenge to the denial of Hammond's request. See Brown v. McNamara, 387 F. 2d 150, 153 n. 5

(3d Cir. 1967), cert. denied, —— U.S. —— (1968) (noting, but not ruling upon, the instant contention). And, we are referred to no case that suggests that presenting a conscientious objector claim as a defense to a charge of violating military law by failing to obey orders would be anything more than a futile and ritualistic gesture. The law knows of no such requirement."

As to the claim that the law officer erred in refusing the defense's requested instructions involving the proposition that accused's beliefs could have rendered him mentally incapable of intentionally defying authority, the record clearly establishes that the accused, the same as Cupp (ACM 13462, Cupp, 24 CMR 565, 572), made a self-determined, voluntary, and intentional choice as to which military orders and duties he would accept or reject. *Dunn* likewise governs this issue. The relevant language in *Dunn* follows:

"It is well established that a self-determined conscientious objection is not a defense to the willful disobedience of military orders. As recently held by an Army Board of Review in a similar case involving a self-determined conscientious objector:

"'We reduce the applicable military law, as we see it, to one simple statement,

'Personal scruples or qualms, whether based upon religious conviction, personal philosophy or other, are no defense to military offenses. (Subpara 169b, MCM, US, 1951; ACM 9036, Morgan, 17 CMR 584; ACM 13462, Cupp, 24 CMR 565).' (CM 413709, Taylor, 37 CMR 547, 552).'" (Dunn, supra, at p. ——).

Moreover, the record discloses that the instructions given by the law officer in this respect exceeded the requirements of the law, and in fact are substantially in accord with the defense's requested instructions. Having received a gratuity, the accused can not now be heard to complain.

The remaining assigned error for our discussion is that the law officer erred in denying the accused's challenge to the array for cause and the motion for mistrial based thereon.

After an extensive voir dire of the 10 court members, individual defense counsel made a motion either to dismiss the entire panel or to grant a mistrial. He pointed out that the examination revealed that all 10 members of the court, except one, had either served in Southeast Asia, or were involved in the training of personnel for service in that area. He argued that this circumstance alone was sufficient *as a matter of law* to establish that the members could not be fair and unbiased.

The law officer ruled that the motion was, in effect, a challenge for cause against the entire panel. In overruling the motion, the law officer advised that the ruling did not preclude the defense from challenging individual members and having such challenges determined by the other members. Defense counsel stated that he was not making any challenges for cause as it would be futile. He challenged one member peremptorily.[3]

Appellate defense counsel have submitted to the Board of Review a roster of all field grade officers (except chap-

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[3] Appellate defense counsel criticize the procedure for challenges for cause prescribed in Articles 41, 51, and 52 of the Code. In this regard, we need say no more than that the United States Court of Military Appeals, in sustaining the present procedure, has recommended amendatory legislation (U.S. v. Cleveland, 15 USCMA 213, 35 CMR 185).

lains) assigned to the 12th Air Force as of the date of the appointing order.[4] According to the roster, at that time there were 1623 so assigned. Of that number, 550, or 34%, had their last tours of duty in Southeast Asia. Counsel argue that since only 34% of the officers assigned to the 12th Air Force had their last tours of duty in Southeast Asia, the fact that 80% of the panel in this case consisted of recent Southeast Asia returnees gives the appearance of a hand-picked panel. They present this novel argument in their brief:

> "Among the members of the array were officers who had flown one hundred and more combat missions in Southeast Asia. Many of them undoubtedly had friends who were shot down. It is common knowledge that every Air Force man who flies in combat has great concern for the safety of his 'wing man', and expects his wing man to have similar concern for him. Added to the combat experience is the ingrained attitude of obedience to all orders without question . . . . When a career officer, a fighter pilot, accused of disobeying an order to train a pilot for combat in Vietnam, is put on trial before a General Court, it would require more than normal human efforts to overcome possible bias, even for a single court member. But where 4/5th of the court are all subject to these same conditioning factors, it is simply impossible to have a fair trial."

Understandably, the defense cites no authority, and our research has found none, which suggests that combat ser-

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[4] Submission of roster made on motion granted by the Board of Review in the exercise of its discretionary authority (Rule 18e, Uniform Rules of Procedure for Proceedings In and Before Boards of Review, 37 CMR xv, xx).

vice as a member of the armed forces of the United States can result in disqualification *as a matter of law* to serve as a member of a court-martial.

Obviously, it could not be seriously contended that those who have served honorably on the field of battle are disqualified *as a matter of law,* individually or collectively, to serve as members of a court-martial in trials involving heinous offenses, such as mutiny or sedition (Article 94), cowardly conduct in the presence of the enemy (Article 99), or aiding the enemy (Article 104). *A fortiori,* a combat background cannot be considered disqualifying as a matter of law in trials involving any offenses of lesser gravity.

The record discloses no impropriety in the selection of the members of the court. They were not "minions of law enforcement agencies" (U.S. v. Hedges, 11 USCMA 642, 29 CMR 458, concurring opinion by Judge Latimer). There is no appearance of a court hand-picked to favor the prosecution. We conclude that the convening authority appointed as members of the court only such persons as, in his opinion, were "best qualified for the duty by reason of age, education, training, experience, length of service and judicial temperament" (UCMJ, Art. 25(d)(2); MCM, 1951, para. 4*d*). There is no evidence to the contrary.

The record of trial clearly establishes there was no bias on the part of any court member. All members expressed their willingness to try the case on the evidence and to follow the instructions on the law given by the law officer.

An accused is not entitled to favorable court members or any particular kind of juror (U.S. v. Sutton, 15 USCMA 531, 36 CMR 29). He has no right to jurors who believe him innocent; however, he does have an unqualified right to jurors whose minds are uncommitted (U.S. v. Deain, 5 USCMA 44, 17 CMR 44). We are fully satisfied the accused

was afforded that right and that the law officer properly denied the motion for a mistrial (U.S. v. Waldron, 15 USCMA 628, 36 CMR 126).

In addition, the fairness and impartiality of the court members is demonstrated by the fact that, notwithstanding the seriousness of the offense, they adjudged a lenient sentence.

In evaluating the appropriateness of the sentence, we have thoroughly considered all the factors and surrounding circumstances in the record. We conclude that the approved sentence is appropriate and should be affirmed.

Article 66(c) having been complied with, the findings of guilty and the sentence are

AFFIRMED.

CHESTER W. WILSON
ERNEST BOUCHER
ROBERT J. TORVESTAD

Opinion of the District Court, District of Colorado, Dated March 29, 1967

Noyd v. *McNamara, et al.*

WILLIAM E. DOYLE, *U.S.D.J.*:

This is an action in which the plaintiff, in a lengthy complaint in which he names the Secretary of Defense, Secretary of the Air Force, Chief of Staff of the Air Force, Superintendent of the Air Force Academy and other officials, seeks declaratory relief and applies for habeas corpus, seeks injunctive relief and, at the moment seeks a preliminary injunction.

The factual basis for this is that plaintiff has declared himself to be a conscientious objector and, notwithstanding that fact, the Air Force proposes to transfer him to Cannon Air Force Base, New Mexico, as of April 1, 1967. The allegation is that this is a training base, or jumping-off base for Vietnam, and that he will be compelled, contrary to his beliefs, to at least train fliers who are going to Vietnam, and he says that this is work that is contrary to his conscientious scruples.

It is to be gleaned from reading the complaint and from statements of counsel that plaintiff is not a member of any religious group, but rather that he holds a philosophy which he declares as "ethical humanism" which dictates these scruples against war. It is also to be gleaned that he does not object to all war; that he objects rather to particular wars of aggression, but specifically to the Vietnam War and that he would not be a conscientious objector if it were a matter of defending the United States. He doesn't rule out the possibility that he would go to foreign countries first in order to carry out an assignment of defending the United States.

From this it is maintained by the defendants that he is not entitled to be classified as a conscientious objector and that it is clear from the record as applied to the statute involved, 50 U. S. C. §456(j), that he is not opposed to war in any form. A definition contained in the statute is called to the Court's attention, and although it is set up in a somewhat left-handed way, it suggests this interpretation. However, an examination of the cases does not bear this out because the Supreme Court has given a broad interpretation to the term, particularly the Seeger case which was cited to me, *United States* v. *Seeger*, 380 U. S. 163, 88 S. Ct. 850 (1965). Although it doesn't deal specifically with whether one can be a conscientious objector in a limited way, it does indicate that there are no particular limitations upon holding these conscientious views in terms of the kind of regimentation or the philosophy that moves one to adopt such views. Moreover, a similar judicial viewpoint, attitude, or approach is made in *Sicurella* v. *United States*, 348 U. S. 404, 75 S. Ct. 403 (1965), so that I must conclude from reading these cases that the complaint is not entirely without substance and that it does demand that the case be given further study.

It has also been strongly urged by the defendants that we do not have jurisdiction to hear and determine the matter. Yet, an almost identical motion was considered by the Court of Appeals for the District of Columbia in the case of *Gallagher* v. *Quinn*, 363 F. 2d 301, in an opinion by Judge Fahy, which specifically recognizes that there is jurisdiction over the subject matter in a factual context similar to this one. So I do feel that it is a case in which a full hearing should be had, either now or later. Indeed, it is going to have to be had, and if this Court were to dismiss this complaint upon the basis of the brief hearing that was had here today, I think that it almost certainly

would be referred back for a hearing in depth on its merits. So, without determining definitely that the cause is one that is meritorious, without intending to establish any precedent for this type of case, it is this Court's conclusion that there is enough merit expressed and there is probable jurisdiction shown justifying the granting of some kind of relief, with a view to taking a closer look at it in an unhurried atmosphere and after both sides have had an opportunity to prepare themselves.

I note that this case was filed on Monday. I have had no opportunity to read the complaint. We heard it this morning. I have been tied up all afternoon and have not had an opportunity to study it. The views expressed are not studied, but they are viewpoints I have arrived at from hearing counsel and from the limited amount of study I have given it. I do feel that this requires a full hearing and this is why I have determined that a preliminary injunction should issue against assigning the plaintiff to combat activity or requiring him to perform duties whereby he will be perhaps faced with the necessity of a General Court Martial or other proceedings that might injure him as a practical matter. I do not wish to interfere with the power of the Air Force to move him from one place to another; in other words, I do not wish to exercise any more power than is necessary under the circumstances and, accordingly, the injunction, or restraining order which is entered is against requiring the plaintiff, until the further order of the Court and until a hearing on the merits can be had, to perform combat-type activity, directly or indirectly. The Court does hold that it retains jurisdiction of the controversy and it is suggested that we try the case on the merits in about three weeks from today, Wednesday, April 19, commencing at 9:30 o'clock a.m.

I would ask counsel to prepare an order consistent with the statements made here.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 830

CAPTAIN DALE E. NOYD, PETITIONER

v.

MAJOR GENERAL CHARLES R. BOND, JR., COMMANDER, TWELFTH AIR FORCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS SUGGESTING MOOTNESS

Petitioner, an Air Force Captain, was stationed at Cannon Air Force Base, New Mexico. On March 8, 1968, he was convicted by a general court-martial of wilfully refusing to obey the order of his superior officer to fly as an instructor with a student pilot. He was sentenced to one year's confinement at hard labor, forfeiture of all pay and allowances, and dismissal from the Air Force. The convening authority approved the sentence on May 10, 1968, and designated the United

States Disciplinary Barracks at Fort Leavenworth, Kansas, as the place of confinement pending completion of military appellate review (Pet. 13a-14a). On September 3, 1968, the Air Force Board of Review affirmed the conviction (Pet. 15a-27a). A petition for review is presently pending before the United States Court of Military Appeals.

The validity of that conviction is not at issue in this collateral proceeding. The sole question sought to be raised in this proceeding concerns the nature of the restraint which the military may impose on petitioner, pending final military review of his conviction. But petitioner's sentence to confinement has completely expired and therefore the question of allowable physical restraint is, as petitioner has recognized, presently moot.[1]

The facts indicating mootness are these: After the convening authority designated Fort Leavenworth as the place of confinement pending appellate review, petitioner brought this action for habeas corpus in the District Court for the District of New Mexico, challenging the proposed transfer to Leavenworth and seeking to be released from the restraint of confinement to quarters, which had been ordered immediately following his sentence. The district judge held that a transfer to the barracks at Fort Leavenworth would be partial "execution" of the sentence prior to appellate review, in violation of 10 U.S.C. 871(c), and or-

[1] Of course, the mootness of his collateral challenge to the form of restraint in no way impairs the vitality of his seperate appeal from the conviction. See *Peyton* v. *Rowe*, 391 U.S. 54; *Carafas* v. *LaVallee*, 391 U.S. 234.

dered petitioner relieved from the transfer order. He refused, however, to order petitioner's release from confinement to quarters, ruling that this was a matter for the exercise of discretion by the appropriate military authorities (Pet. 7a-12a). Thereafter the Air Force rescinded the transfer order and directed that petitioner be restricted, under guard, to a room in the Visiting Officer's Quarters. On cross-appeals, the court of appeals held (Pet. 1a-6a) that the district court should not have entertained the action, since petitioner had not exhausted his available military remedies, including an application to the Court of Military Appeals for an extraordinary writ, in accordance with *Levy* v. *Resor*, 17 U.S.C.M.A. 135. The court of appeals accordingly reversed the granting of partial relief to petitioner. The instant petition for a writ of certiorari seeks review of that judgment refusing to inquire into the form of physical restraint imposed upon petitioner.

Before applying for certiorari, however, petitioner filed an application with the Circuit Justice seeking release from restraint pending the disposition of the present petition. The application was sought on the ground that such relief was necessary to prevent the issue sought to be raised from becoming moot, since petitioner's one-year sentence, taking into account the time credited for good behavior, was to expire on December 26, 1968.[2] The government opposed the appli-

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[2] Even though 10 U.S.C. 871(c) precludes execution of a sentence before review is completed, under 10 U.S.C. 857(b) "[a]ny period of confinement included in a sentence of a court-

cation on the ground that petitioner was clearly not entitled to be released from the restraint of confinement to quarters, see *Levy* v. *Resor*, 17 U.S.C.M.A. 135 and *Levy* v. *Resor*, 384 F. 2d 689 (C.A. 4), certiorari denied, 389 U.S. 1049, and that the issue in any event had little significance for the future in light of a new statute passed by Congress and effective on August 1, 1969.[3] On December 18, 1968, the Circuit Justice denied the application. On December 24, 1968, Mr. Justice Douglas, to whom the application had then been referred, ordered that, until the full Court had an opportunity to pass on the petition, petitioner "should be placed in a non-incarcerated status, which as the District Court said, should prevent his superiors from 'assigning the plaintiff to combat activity or requiring him to perform duties whereby he will be perhaps faced with the necessity of a General Court Martial or other proceedings that might injure him as a practical

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martial begins to run from the date the sentence is adjudged by the court-martial," unless the sentence is "suspended". (Suspension of sentence means only a disposition akin to placing a defendant on probation. *United States* v. *May*, 10 U.S.C.M.A. 358.) No order suspending petitioner's sentence was issued, and his sentence thus continued to run from March 8, 1968, the date on which he was sentenced.

[3] The Military Justice Act of 1968 (82 Stat. 1335) *inter alia* amends 10 U.S.C. 857 to provide for a system similar to that of bail in the civilian courts, whereby the officer having jurisdiction over a person convicted by general court-martial will have the power "in his sole discretion [to] defer service of the sentence to confinement," in which event the sentence will not run until it is ordered executed (82 Stat. 1341). The deferment will not, like suspension of a sentence, result in probationary status for the prisoner but will have the effect of a release on personal recognizance, permitting normal duties pending appellate review of the conviction.

matter'." [4] That order did not, however, interrupt the running of petitioner's sentence to confinement. On December 26, 1968, that portion of the sentence was completed and petitioner is no longer subject to any physical restraint under it. It is apparent, therefore, that the present action, seeking relief from physical restraints, is now moot. In accordance with customary practice, the petition should be granted, the judgment below vacated, and the cause remanded with directions to dismiss as moot.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1969.

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[4] Mr. Justice Douglas was quoting from the opinion of District Judge Doyle (Pet. App. 28a-30a) in *another* litigation brought by petitioner, *before* he was court-martialed. As petitioner points out (Pet. 6-7), the preliminary injunction explained in the quoted language was later vacated by the district judge, with the court of appeals affirming the denial of relief and this Court denying certiorari.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 329728 397

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 830

CAPTAIN DALE E. NOYD, PETITIONER

v.

MAJOR GENERAL CHARLES R. BOND, JR., COMMANDER, TWELFTH AIR FORCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE RESPONDENTS

1. This supplemental memorandum is submitted to clarify the government's position that the petition for a writ of certiorari is now moot. Petitioner's reply to our Suggestion of Mootness indicated that the government was, in effect, arguing that "no Justice of this Court, nor even the entire Court, has the power, via habeas corpus, bail, release on recognizance, or any other remedy extraordinary or otherwise, to interrupt the running of a military sentence and thereby prevent it from becoming moot while the merits are under judicial scrutiny" (Reply Memorandum p. 6). Petitioner relied on ¶ 97c of the

330-950—68

Manual for Courts-Martial, United States, 1951, as demonstrating that his petition is not moot. His characterization of the government's position, however, is wholly inaccurate and his reliance on ¶ 97c of the *Manual* misplaced.

First, we note that the present action involves only a relatively narrow challenge to the types of restraint permissible under the Uniform Code of Military Justice pending appellate review of a court-martial conviction, and is not an attempt to secure review of the "merits" of the conviction itself. Indeed, we expressly conceded in our Memorandum Suggesting Mootness (p. 2, n. 1) that the mootness of the present action, by reason of the expiration of the sentence to confinement, in no way affects the vitality of petitioner's separately pending proceedings to review the court-martial conviction itself.

Secondly, we in no way intimated that this Court, or a Justice thereof, is powerless to interrupt the running of a military sentence. Rather, our position was and is only that in *this* case the sentence continued to run from the date on which it was adjudged and was not interrupted by the order entered by Mr. Justice Douglas two days before it was to expire. Petitioner does not contest the general principle that under Article 57(b) of the Uniform Code, 10 U.S.C. 857(b), a period of confinement runs continuously and automatically from the date the sentence is adjudged, except for periods "during which the sentence to confinement is suspended". As we pointed out in our prior Memorandum (p. 3, n. 2), "suspension" in that sense refers only to the discretionary power of

military authorities to place a convicted serviceman in a status akin to probation in lieu of execution of all or part of his sentence (see Articles 71, 72, 74, 10 U.S.C. 871, 872, 874; ¶¶ 88e, 97a, 97b, 105, *Manual for Courts-Martial, United States, 1951*), and it is undisputed that petitioner's sentence to confinement was not "suspended".

Instead, petitioner points to ¶ 97c of the *Manual*, which lists the other factors—deemed implicit in the Code, see *United States* v. *Bryant*, 12 U.S.C.M.A. 133, 30 C.M.R. 133 (1961)—which interrupt the running of a sentence. See, AR 633–30, ¶ 5b; AFR 125–30, ¶ 5b ("inoperative time"). None of those exceptions to the general rule, however, applied to this case so as to toll the running of petitioner's sentence. Petitioner places particular reliance upon the "exception" which states (¶ 97c):

> Periods during which the person undergoing such a sentence * * * is erroneously released from confinement upon his petition for a writ of habeas corpus under a court order which is later reversed by a competent tribunal, shall be excluded in computing the service of the term of the punishment.

For several reasons, the Air Force claims no authority under this (or any other) provision of the *Manual* to hold petitioner for two more days of his sentence. For one, this clause of the *Manual* authorizes treatment of the sentence as tolled only when a prisoner has been released from "confinement". But this term of art in military law is not applicable to the case at bar. Drawing on the Code's distinctions (see

Article 9a, 10 U.S.C. 809(a)), the *Manual* distinguishes between "arrest" and "confinement", providing that "arrest" is the *moral* restraint imposed upon a serviceman by oral or written orders of competent authority directing him to remain within certain specified limits, while "confinement" is the "physical restraint of a person" (¶¶ 18a, 20a). In this case, exercising his authority under ¶ 21d of the *Manual* to determine the type of restraint, if any, appropriate following a military trial, petitioner's commanding officer chose to place petitioner in the status of "arrest in quarters" and not in "confinement", as those terms are used in military law. We are appending hereto a copy of the base commander's letter to petitioner advising him of this status and of its restrictions. In light of the commanding officer's decision to provide for restraint not amounting to "confinement", no exception in the Code or the *Manual* operated to toll the running of petitioner's sentence when Mr. Justice Douglas ordered him released from the lesser restrictions of "arrest in quarters".

In addition, ¶ 97c, on which petitioner relies, applies only to a release "erroneously" ordered on writ of habeas corpus, and permits treatment of the sentence as tolled during that period only when the order of release has been "reversed" by a competent tribunal. Neither the conditions nor the policies involved in that exception are relevant here. Mr. Justice Douglas's order did not involve release upon petition for a writ of habeas corpus. The relief sought and granted was in form and in fact simply a stay of mandate and enlargement on personal recognizance pending action on a

certiorari petition. There is no authority in military law to treat the interlocutory relief of admission to bail—what petitioner sought and received—as tolling the running of a sentence to confinement under Article 57(b), *supra,* which ordinarily runs continuously whether the serviceman is in confinement, under arrest, or under no restraint whatever pending review of the conviction.[1]

Finally, the stay-and-release order entered by Mr. Justice Douglas furnished purely interlocutory relief without adjudicating any legal question, and is to expire of its own force when the Court acts on the underlying petition for certiorari. In no sense, therefore, will the termination of the release order involve a "reversal" of an "erroneous" grant of habeas corpus.

2. The circumstances of this case underscore the premises of the mootness doctrine. Petitioner's personal interest in the case is now wholly academic: the

[1] The order entered by Mr. Justice Douglas directed that petitioner be placed in a "non-incarcerated status" and not assigned to duties which might as a practical matter lead to a court-martial for disobeying orders. That relief was expressly quoted from a preliminary injunction issued in petitioner's favor in another action brought *before* he was court-martialed. (The district judge had subsequently vacated the injunction for want of jurisdiction). There was, however, no danger that petitioner would have been assigned to duties inconsistent with his claimed conscientious objection even had Mr. Justice Douglas not so ordered. Under military law, a person in arrest status, as petitioner was at the time of the release order, cannot be assigned military duties involving command or the bearing of arms. *Manual* ¶ 20a. Furthermore, under Air Force regulations, an officer sentenced to dismissal by court-martial is automatically disqualified from flying status. ¶ 2-29(h), AF Manual 35-13.

action was instituted to test the permissibility of certain forms of restraint pending review of his conviction within the military appellate structure, but by reason of the expiration of his sentence to confinement at hard labor—which was never executed—there is no longer any restraint imposed upon him. (Indeed, he has been restored to duty.) In addition, the issues that he sought to raise, as we discussed more fully in our prior Memorandum (p. 4), have little prospective significance in light of the intervening passage of the Military Justice Act of 1968. Accordingly, the petition for a writ of certiorari should be granted and the cause remanded with directions to dismiss as moot.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1969.

APPENDIX

25 Jun 1968

Reply to attn of: CSC
Subject: Arrest in Quarters—Limitations on Your Activities
To: Captain Dale E. Noyd
Room 15, Building T–55
Cannon AFB, New Mexico 88101

1. Your place of arrest in quarters will continue to be Room 15, Building T–55, Cannon Air Force Base, New Mexico. However, the terms of your arrest are changed as follows to limit your activities:

a. You will be allowed to go to the dining hall only between 0700 and 0745 hours, and between 1145 and 1230 hours, and between 1700 and 1745 hours daily.

b. You will be allowed to visit the mail room only between 0700 and 0745 hours and between 1700 and 1745 hours daily.

c. You will be allowed to visit the Base Exchange only between 1000 and 1030 hours each Tuesday.

d. You will be allowed to visit the Base Laundry concessionaire only between the hours of 1030 and 1100 each Tuesday.

e. You will be allowed to visit the Base Library only between the hours of 1800 and 1900 each Thursday.

f. You will be allowed to visit the Base Barber Shop only between the hours of 0800 and 0900 each Tuesday.

g. You may visit the Base Gym for exercise between 0900 and 1030 hours on Friday provided you are accompanied by Captain Bruce H. Anderson or

Captain (Dr.) Gregory R. Bonomo, and you will associate with no other person during these periods.

h. You will be allowed to visit the Chapel only once on Sunday.

In case any of the facilities listed in b through g are to be closed at these enumerated times because of a holiday or inventory, etc., you may substitute the preceding day.

You will not be escorted on these trips, however, you will take only the time necessary to accomplish these trips and return immediately to your quarters, but in no event will you take more time than the times enumerated above. Upon leaving and returning to your quarters for any reason you will notify Security Police Operations. In case of inclement weather or some other reason you need motor transportation on any of these trips, the Security Police will provide such transportation. You will wear the appropriate uniform at all times when you are not in your quarters. You will not leave your quarters for any other reason without permission of the Base Commander, except as follows: You may leave your quarters to visit the Base Hospital without prior notification to anyone at any time you have a medical or dental emergency. In case you need medical or dental attention not amounting to an emergency, you will notify Security Police Operations and then proceed to the hospital.

2. You will be authorized to have TV cable, a telephone and maid service in your room at your own expense.

3. Your quarters will be off limits to all personnel with the following exceptions:

a. You may have any defense counsel visit you at any time.

b. Members of your family may visit you two times a week for a period of two hours per visit on Wednesdays between 1400 and 1600 hours and on Sundays between 1400 and 1600 hours.

c. You may have other friends visit you once a week for a period of one hour on Thursdays between 1500 and 1600 hours. Any other persons wishing to visit you must have prior permission of the Base Commander.

4. You will acknowledge receipt of this communication by indorsement hereon and indicate therein your complete understanding of the same.

GEORGE R. DOERR,
Colonel, USAF, Commander.

Receipt acknowledged and contents understood.

/s/ Dale E. Noyd,
DALE E. NOYD,
Captain, USAF.

Date: 28 Jun 68

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SUPREME COURT, U. S.

Supreme Court of the United States

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OCTOBER TERM, 1968

No. 830

CAPTAIN DALE E. NOYD,

Petitioner,

—v.—

MAJOR GENERAL CHARLES R. BOND, JR., Commander, Twelfth Air Force, United States Air Force; COLONEL GEORGE R. DOERR, Commander, 832nd Combat Support Group, and Commander, Cannon Air Force Base, New Mexico; COLONEL ROBERT R. SCOTT, Commander, 832nd Air Division, Cannon Air Force Base, New Mexico; COLONEL JIMMY J. JUMPER, Commander, 27th Tactical Fighter Wing, Cannon Air Force Base, New Mexico; LIEUTENANT COLONEL JAMES L. GLESSNER, JR., Commander, 524th Tactical Fighter Squadron, Cannon Air Force Base, New Mexico; CAPTAIN CHARLES THOMPSON, Commander, 832nd Security Police Squadron, Cannon Air Force Base, New Mexico,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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The Court of Appeals improperly denied relief on the grounds of failure to exhaust military remedies, although such doctrine, of dubious validity in any event, has no application where the military authority acts outside its jurisdiction. Exhaustion is likewise not required since the asserted military remedies in this case would be inadequate, ineffective and impractical. The Court of Appeals' constricted jurisdictional holding is in conflict with decisions of other Courts of Appeals 22

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Supreme Court of the United States

OCTOBER TERM, 1968

No. 830

CAPTAIN DALE E. NOYD,

Petitioner,

—v.—

MAJOR GENERAL CHARLES R. BOND, JR., Commander, Twelfth Air Force, United States Air Force; COLONEL GEORGE R. DOERR, Commander, 832nd Combat Support Group, and Commander, Cannon Air Force Base, New Mexico; COLONEL ROBERT R. SCOTT, Commander, 832nd Air Division, Cannon Air Force Base, New Mexico; COLONEL JIMMY J. JUMPER, Commander, 27th Tactical Fighter Wing, Cannon Air Force Base, New Mexico; LIEUTENANT COLONEL JAMES L. GLESSNER, JR., Commander, 524th Tactical Fighter Squadron, Cannon Air Force Base, New Mexico; CAPTAIN CHARLES THOMPSON, Commander, 832nd Security Police Squadron, Cannon Air Force Base, New Mexico,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The decision of the United States District Court for the District of New Mexico, Honorable H. Vearle Payne, Chief Judge, presiding, granting in part and denying in part a petition for a writ of habeas corpus, is reported at 285 F. Supp. 785 (D. N. Mex. 1968) and is printed in the Appendix, p. 16. The decision of the Court of Appeals for the Tenth Circuit reversing the District Court on jurisdictional grounds is reported at 402 F. 2d 441 (10th Cir. 1968), App., p. 22. The opinion of Mr. Justice Douglas, ordering petitioner released from incarceration pending certiorari, and staying respondents in the interim from certain acts, is reported at 89 S. Ct. 478 (Dec. 24, 1968), App., p. 27.[1]

Jurisdiction

The judgment of the Court of Appeals was entered on October 30, 1968. The petition for certiorari was docketed on December 13, 1968. Certiorari was granted on January 20, 1969, 89 S. Ct. 692. Jurisdiction is conferred on this Court pursuant to 28 U. S. C. §1254(1).

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[1] The language quoted by Mr. Justice Douglas in framing the terms of the stay is from the decision of Hon. William E. Doyle, U.S.D.J., granting a preliminary injunction in *Noyd* v. *McNamara, et al.*, —— F. Supp. —— (D. Colo., Mar. 29, 1967) (not yet reported but printed in the Appendix, p. 48). Judge Doyle subsequently dismissed the complaint in *Noyd* v. *McNamara, et al.*, on jurisdictional grounds, specifically, that petitioner had failed to exhaust his military remedies. 267 F. Supp. 701 (D. Colo. 1967), aff'd 378 F. 2d 538 (10th Cir. 1967), cert. den. 389 U. S. 1022 (1967).

Constitutional Provisions, Statutes and Regulations Involved

United States Constitution,
Article I, Section 9(2):

> "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

United States Constitution,
Fifth Amendment:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

28 U. S. C. §2241(a):

> "(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had."

Uniform Code of Military Justice,
Art. 71(c); 10 U. S. C. §871(c):

"(c) No sentence which includes, unsuspended, a dishonorable or bad-conduct discharge, or confinement for one year or more, may be executed until affirmed by a board of review and, in cases reviewed by it, the Court of Military Appeals."

Uniform Code of Military Justice,
Art. 13; 10 U. S. C. §813:

"Subject to section 857 of this title (article 57), no person, while being held for trial or the result of trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances require to insure his presence, but he may be subjected to minor punishment during that period for infractions of discipline."

Uniform Code of Military Justice,
Art. 57(b); 10 U. S. C. §857(b):

"(b) Any period of confinement included in a sentence of a court-martial begins to run from the date the sentence is adjudged by the court-martial, but periods during which the sentence to confinement is suspended shall be excluded in computing the service of the term of confinement."

Manual for Courts-Martial, United States, 1968,
¶18b(3):

"(3) Other than restraint administered as prescribed in this subparagraph (18*b*(3)), forfeiture of pay or

allowances due on and after the date of approval of certain sentences, and minor punishments for infractions of discipline while confined, no punishment may be imposed upon an accused as a result of trial by court-martial until the sentence has been approved and ordered executed. No person, while being held for trial or the result of trial, may be subjected to punishment or penalty other than arrest, restriction, or confinement upon the charges pending against him, nor shall the arrest, restriction, or confinement imposed upon him be any more rigorous than the circumstances require to insure his presence, but he may be subjected to minor punishment during that period for infractions of discipline (Art. 13). Minor punishment shall include all punishment authorized by regulations of the Secretary of a Department for violation of the discipline prescribed for the place in which an accused is confined. See 68*g* regarding the effect of punishments for minor offenses upon subsequent court-martial proceedings. Prisoners being held for trial or whose sentences have not been approved and ordered executed will be accorded the facilities, accommodations, treatment, and training prescribed in pertinent regulations."

Manual for Courts-Martial, United States, 1968, ¶21d:

"d. *Responsibility for restraint after trial.* Upon notification from a trial counsel of the result of a trial (44*e*), a commanding officer will take prompt and appropriate action with respect to the restraint of the person tried. This action, depending on the circumstances, may involve the immediate release of the per-

son from any restraint, or the imposition of any necessary restraint, pending final action on the case. See 20*d*(1)."

Manual for Courts-Martial, United States, 1968, ¶97c:

"c. *Interruptions of execution of a sentence.* A sentence to confinement, hard labor without confinement, restriction to limits, or deprivation of privileges is continuous until the term expires, with certain exceptions. These exceptions include the following:

"When delivery under Article 14 is made to any civil authority of a person undergoing sentence of a court-martial, the delivery, if followed by conviction in a civil tribunal, interrupts the execution of the sentence of the court-martial, and the offender after having answered to the civil authorities for his offense shall, upon the request of competent military authority, be returned to military custody for the completion of his sentence (Art. 14(b)).

"When a prisoner serving a court-martial sentence to confinement is later convicted by a court-martial of another offense for which he is sentenced to confinement, the subsequent sentence interrupts the running of the prior sentence will be served after the subsequent sentence has been fully executed.

"Periods during which the person undergoing such a sentence is absent without authority, or is absent under a parole which proper authority has later revoked, or is erroneously released from confinement through misrepresentation or fraud on the part of the prisoner, or is erroneously released from confinement upon his peti-

tion for a writ of habeas corpus under a court order which is later reversed by a competent tribunal shall be excluded in computing the service of the term of the punishment.

"Periods during which a sentence to confinement is suspended shall be excluded in computing the service of the term of confinement (Art. 57(b))."

Questions Presented

1. Where a military prisoner is ordered into confinement to commence serving a court-martial sentence, in apparent violation of a provision of the Uniform Code of Military Justice which forbids execution of such sentence until after the completion of military appellate review, is a Federal court deprived of habeas corpus jurisdiction by the doctrine of exhaustion of military remedies?

2. May a military prisoner be ordered into confinement to commence serving a court-martial sentence of one year's confinement prior to the completion of military appellate review in the face of Article 71(c) of the UCMJ which forbids execution of such sentence until after the completion of military review?

3. Petitioner is an Air Force officer who became a conscientious objector after 11 years of honorable service, and whose application for classification as a conscientious objector and either separation or reassignment to duties not conflicting with his conscience, was denied by the Secretary of the Air Force. Judicial review of the denial of his application was declined by the United States District Court for the District of Colorado and by the Tenth Circuit on the

grounds of exhaustion of military remedies, such courts holding that wrongful denial could be raised as a defense to any ensuing court-martial for disobedience of an order. This Court denied certiorari. At the ensuing general court-martial, petitioner was convicted of disobedience and sentenced to dismissal, total forfeiture of all pay and allowances, and confinement for one year. In such court-martial proceeding and in the review thereof by an Air Force Board of Review, jurisdiction to consider petitioner's defense based on wrongful denial of conscientious objection was again declined, the Board of Review holding that only the Federal courts had jurisdiction to remedy erroneous administrative action by the Secretary of the Air Force. Although UCMJ, Article 71(c) forbids execution of any sentence involving confinement of one year or more prior to the completion of military appellate review, petitioner was ordered into confinement by respondents "pending completion of appellate review."

(a) Under these circumstances, has petitioner been deprived of his liberty without due process of law in that he has been tried, convicted, sentenced, and ordered into confinement before there has been any hearing on the merits of his case?

(b) Is the Tenth Circuit's reversal of the District Court's partial grant of habeas corpus, again on grounds of exhaustion of military remedies, an unconstitutional suspension of the writ of habeas corpus?

Statement of the Case

Petitioner, a Captain in the United States Air Force, was convicted on March 8, 1968 by a General Court-Martial at Cannon Air Force Base, Clovis, New Mexico, of violating Article 90 of the Uniform Code of Military Justice. Article 90 proscribes the willful disobedience of a lawful order. The order which Captain Noyd, a former fighter pilot, was accused of disobeying was that he fly an instructional mission with a student pilot in order to train him for combat duty in Vietnam.

Petitioner's principal defense was that, prior to the order in question, he had made application for separation or reassignment as a conscientious objector, that such application had been wrongfully denied by the Secretary of the Air Force pursuant to an error of law, and that such error of law tainted the subsequent order to train the student pilot and rendered it illegal. The essential error of law made by the Secretary, and the underlying substantive question in all of the Noyd litigation[2] is that Captain Noyd was deemed disqualified from classification as a conscientious objector because he was a "selective" conscientious objector, a discriminating pacifist rather than a universal pacifist.

On March 9, 1968, he was sentenced by the general court-martial to dismissal from the service, forfeiture of all pay

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[2] The first case was the unsuccessful effort to secure pre-court martial judicial review of the denial of his application, *Noyd* v. *McNamara*, 267 F. Supp. 707 (D. Colo. 1967), aff'd 378 F. 2d 538 (10th Cir. 1967), cert. den. 389 U. S. 1022 (1967). Next came the court-martial proceedings, *U. S.* v. *Noyd*, ACM 20121, —— CMR ——. See App., p. 35. This case, *Noyd* v. *Bond*, *supra*, was instituted in an effort to prevent the unlawful execution of Capt. Noyd's sentence of one year's confinement prior to completion of military appellate review.

and allowances, and one year's confinement. Immediately following his sentence, petitioner was ordered confined to his quarters pending appeal by order of respondent Colonel Doerr, the Base Commander of Cannon Air Force Base. On May 10, 1968, the General Court-Martial convening authority, the respondent General Bond, approved the conviction and sentence and ordered petitioner confined at the United States Disciplinary Barracks, Fort Leavenworth, Kansas "pending completion of appellate review." [Headquarters, Twelfth Air Force (TAC) General Court-Martial Order No. 13 dated 10 May 1968 (hereinafter "GCMO13").] GCMO13 is printed at App., p. 30.

Pursuant to military law, petitioner was entitled to appellate review of his conviction by an Air Force Board of Review and further review, on petition for grant of review, by the United States Court of Military Appeals. 10 U. S. C. §§866, 867. On September 3, 1968, an Air Force Board of Review upheld petitioner's conviction, ruling that it lacked jurisdiction to review whether the Secretary had acted unlawfully. *United States* v. *Noyd,* ACM 20121, —— CMR ——. The opinion of the Air Force Board of Review has not yet been reported. It is printed in the App., p. 35. Captain Noyd's petition for grant of review to the Court of Military Appeals was granted on January 23, 1969.

The only judge thus far to rule on the merits of Captain Noyd's defenses was sufficiently moved to issue a preliminary injunction restraining the Air Force from placing Captain Noyd in a position where he would be compelled to disobey an order in violation of his conscientious beliefs. *Noyd* v. *McNamara,* —— F. Supp. —— (D. Colo., Mar. 29, 1967) *per* Judge Doyle. This decision by Judge Doyle has not yet been reported. It is printed in the App.,

p. 48. Judge Doyle subsequently invoked the doctrine of exhaustion of military remedies and ruled that the merits of Captain Noyd's legal defenses must be passed upon by the military courts prior to consideration by the Federal District Court. *Noyd* v. *McNamara,* 267 F. Supp. 701 (D. Colo. 1967), aff'd 378 F. 2d 538 (10th Cir. 1967), cert. den. 389 U. S. 1022 (1967). Unfortunately, the military courts have, thus far, declined to pass upon those defenses. See App., pp. 40-41.

Nevertheless, Captain Noyd was in physical confinement from March 9, 1968, pending military appellate review of his conviction, until December 24, 1968, when he was released from incarceration pursuant to order of Mr. Justice Douglas, 89 S. Ct. 478, App., p. 27. The conditions of Captain Noyd's confinement at Cannon Air Force Base are set forth at App., p. 32.

Not content with Captain Noyd's confinement at Cannon Air Force Base, the respondent General Bond, ordered Captain Noyd confined to the United States Disciplinary Barracks at Fort Leavenworth, Kansas pending the results of his appeal (GCMO13). The order of confinement to Leavenworth led to the filing of a petition for a writ of habeas corpus in the United States District Court for the District of New Mexico. Only the order of the Federal District Court, entered on May 24, 1968, prevented the execution of the Leavenworth confinement order.[3]

Chief Judge Payne, in his decision in the District Court, recognized that any attempt to jail Captain Noyd prior to

[3] Although the Tenth Circuit reversed the District Court, thereby freeing respondents from the restraint imposed by the District Court's order, and thereby permitting the Leavenworth confinement order to be executed, the Tenth Circuit subsequently, on December 6, 1968, granted a stay of its mandate pending certiorari.

the completion of military appellate review would constitute a clear violation of Article 71(c) of the Uniform Code of Military Justice, since Article 71(c) forbids execution of a sentence which includes confinement of one year or more, prior to the completion of appellate review. Accordingly, he invalidated the attempt to incarcerate Captain Noyd at Fort Leavenworth pending the completion of appellate review, 285 F. Supp. 785. See App., p. 16.

Both sides appealed Judge Payne's decision to the Court of Appeals. Petitioner appealed from so much of Judge Payne's decision as declined to order his complete release from confinement pending completion of military appeals. Respondents appealed from so much of the decision of the District Court as partially granted the writ.

The Court of Appeals ruled below, however, that the District Court lacked the power to relieve petitioner from premature confinement at Leavenworth pending appeal because petitioner had "failed to exhaust his military remedies." The District Court was reversed. 402 F. 2d 441, 443, App., p. 22.

Simultaneously with the filing of a petition for certiorari, petitioner's counsel made application to Mr. Justice White, in his capacity as Circuit Justice, for release from confinement pending certiorari.[4] Mr. Justice White denied the application on December 18, 1968.

With time credited for good behavior, Captain Noyd's sentence of one year's confinement, which had commenced

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[4] In accordance with Rules 27, 50 and 51 of this Court, before making such application to the Circuit Justice, petitioner's counsel made a similar application to the Tenth Circuit. The Tenth Circuit denied the application for release from confinement pending certiorari on December 6, 1968.

running on March 9, 1968, was due to expire on December 26, 1968. See Departments of the Army and the Air Force, AR 633-30, AF 125-30, "Military Sentences to Confinement" (Nov. 1964). Petitioner's concern that mootness problems might arise if the running of the sentence were not interrupted was expressed in the application.

Petitioner's counsel subsequently made application to Mr. Justice Douglas for release from confinement pending certiorari. On December 24, 1968, Mr. Justice Douglas granted the relief set forth in his opinion, 89 S. Ct. 478, App., p. 27, commenting specifically, that two substantial questions were raised: (1) whether the doctrine of exhaustion of military remedies applies where the question at issue is whether the court-martial convening authority acted beyond jurisdiction; and (2) the respective scope of review of the Court of Military Appeals and the Federal courts on military habeas corpus applications of this nature.

Noting that the application had been made to him during recess, and that the Court would not reconvene until January 10, 1969, Mr. Justice Douglas directed that petitioner be placed "in a non-incarcerated status," and otherwise protected, until the entire Court could consider the petition for certiorari, 89 S. Ct. at 479.

In response to the petition for certiorari, and Mr. Justice Douglas' release order, the Government filed a "Memorandum for the Respondents Suggesting Mootness." This memorandum took the position that the matter was moot, notwithstanding the order of Mr. Justice Douglas, since pursuant to Article 57(b) of the UCMJ, 10 U. S. C. §857(b), petitioner's confinement, which commenced to run on the date it was adjudged, could not be interrupted "un-

less the sentence is 'suspended'." (Memo, pp. 3-4, fn. 2.) Petitioner filed a reply memorandum in opposition to respondents' memorandum suggesting mootness, citing paragraph 97c of the Manual for Courts-Martial, *supra*, p. 6, two decisions of the Court of Military Appeals, as well as the legislative history of UCMJ 57(b), all of which indicate that "probationary suspension" of a sentence is not the only occasion when the running of a sentence is interrupted.

The Government then submitted a "Supplemental Memorandum for the Respondents." On January 20, 1969, the petition for a writ of certiorari was granted. The order granting certiorari stated further that the stay theretofore granted by Mr. Justice Douglas "shall remain in effect pending the issuance of the judgment of this Court or until further order of this Court." 89 S. Ct. 692, App., p. 29.

Following Judge Payne's decision, on June 6, 1968, the respondent Doerr ordered petitioner moved from his family quarters, to which he had previously been confined, to a room in a bachelor officers' quarters. The conditions of his incarceration remained substantially the same until petitioner was ordered released by Mr. Justice Douglas on December 24, 1968. They included absolute restriction to his room except for authorized exits, at specific hours, in each case with prior notification to Security Police, to obtain meals and to take care of personal needs; restriction of exercise to one weekly period of 1½ hours; restriction of visiting by his wife and two infant children to two weekly visits of two hours each; all non-family visiting restricted to one

weekly one-hour period; a large sign affixed to his door which read "Off Limits to Military Personnel." App., p. 32.

Pursuant to Mr. Justice Douglas' order, petitioner was released from confinement on December 24, 1968 and restored to duty. He is presently assigned as Special Assistant to the Wing Commander of the 27th Tactical Fighter Wing at Cannon Air Force Base, New Mexico. Pursuant to the protective provision included in Mr. Justice Douglas' order, and continued by the order of this Court, prior to receiving his various assignments, petitioner was asked if these assignments were of a nature which would interfere with his conscientious beliefs and thereby perhaps subject him to another court-martial or other proceedings that might injure him. In response thereto petitioner assured his superiors that the various administrative and personnel duties assigned to him were in no way in conflict with his beliefs and he has proceeded to perform these duties.

Summary of Argument

I. The Court of Appeals Improperly Denied Relief on the Grounds of Failure to Exhaust Military Remedies.

The doctrine of "exhaustion of military remedies", insofar as it retains any validity at all, applies only to attempts to secure review of errors allegedly committed by a court martial. *Gusik* v. *Schilder*, 340 U. S. 128 (1950). It has no application to an attack upon the bare legality of military confinement—unconnected with any attack upon the underlying court-martial proceeding.

(a) Questionable applicability of exhaustion doctrine.

(1) "Jurisdiction" and the Exhaustion of Military Remedies.

When the jurisdiction of the military to impose restraints is questioned, a petitioner need not exhaust his military remedies prior to seeking relief in the Federal Courts. *U. S. ex rel. Guagliardo* v. *McElroy,* 158 F. Supp. 171 (D. D. C. 1958), 259 F. 2d 927 (D. C. Cir. 1968), aff'd 361 U. S. 281 (1960); *Reid* v. *Covert,* 354 U. S. 1 (1957); *U. S. ex rel. Toth* v. *Quarles,* 350 U. S. 11 (1955); *Gallagher* v. *Quinn,* 363 F. 2d 301 (D. C. Cir. 1966), cert. den. 385 U. S. 881 (1966). Since Captain Noyd contended that the Uniform Code of Military Justice totally removed the military's jurisdiction to jail him pending appeal, he was under no obligation to exhaust his military remedies prior to seeking relief in a Federal Court. *Oestereich* v. *Selective Service System Local Board No. 11,* 89 S. Ct. 414 (1968).

(2) Exhaustion of remedies generally.

Courts have refrained from invoking the "exhaustion" doctrine:

(a) where the imposer of sanctions acted plainly beyond its jurisdiction or contrary to law. *Oestereich* v. *Selective Service System Local Board No. 11, supra; McCullouch* v. *Sociedad Nacional,* 372 U. S. 10 (1963); *Leedom* v. *Kyne,* 358 U. S. 184 (1958).

(b) where the administrative remedies are inadequate. *NLRB* v. *Marine Workers,* 391 U. S. 418 (1968); *Damico* v. *California,* 389 U. S. 416 (1967).

(c) where the delay inherent in exhaustion would cause irreparable injury. Jaffe, *Judicial Control of Administrative Action* 429 (1965).

(d) where the attempted exhaustion would prove a futility. *Levers* v. *Anderson,* 326 U. S. 219 (1945); *Hammond* v. *Lenfest,* 398 F. 2d 705 (2nd Cir. 1968).

Since respondents acted plainly beyond their statutory power, in violation of a right provided by Congress, there is no requirement of exhaustion. *Oestereich* v. *Selective Service System Local Board No. 11, supra.*

(b) Inadequacy and ineffectiveness of suggested military remedies.

(1) Inadequacy of normal appellate process

Because of the unique nature of right to minimal restraint pending appeal, it cannot be urged via the normal appellate channels, without destroying it.

(2) Inadequacy of extraordinary writ application to Court of Military Appeals.

A number of very serious practical difficulties would be created if all military habeas corpus petitions were initially funnelled through the Court of Military Appeals:

(a) an extraordinary strain would be placed upon the Court, inhibiting its ability to fulfill its primary role as an appellate tribunal.

(b) extraordinary practical difficulties would be encountered in transporting petitioners and witnesses to Washington, D. C. to take part in habeas corpus hearings. *Johnson* v. *Eisentrager,* 339 U. S. 763 (1950).

(c) great difficulty would be encountered in retaining civilian counsel to prosecute a habeas corpus peti-

tion in Washington, D. C. on behalf of military prisoners in custody in distant military installations.

(3) Hesitant quality of Court of Military Appeals' practice on extraordinary writ applications.

It is scarcely two years since the Court of Military Appeals ruled that it possessed habeas corpus jurisdiction. To date, however, no extraordinary writ has been issued by the Court. Although habeas practice may develop in the future, the inherent limitations in the process of jurisdictional evolution render the present status of habeas practice in the Court of Military Appeals ineffective to provide adequate, effective and practical relief.

(4) No bar exists, by way of comity or otherwise, to concurrent habeas corpus jurisdiction.

Habeas corpus jurisdiction over military personnel may exist concurrently between the Court of Military Appeals and the Federal courts. Since only one sovereignty is involved—the United States of America—no principle of comity bars concurrent jurisdiction. *Fay* v. *Noia*, 372 U. S. 391 (1963).

(c) Conflict between the circuits.

This Court should reject the narrow jurisdictional position of the 10th Circuit below and adopt the practical jurisdictional position enunciated by the Second Circuit in *Hammond* v. *Lenfest, supra* and by the Fifth Circuit in *In re Kelly*, —— F. 2d ——, 37 U. S. L. W. 2165 (5th Cir. 1968).

II. General Court Martial Order #13 Ordering Captain Noyd Confined to the United States Disciplinary Barracks at Forth Leavenworth "Pending Completion of Appellate Review" Violated the Uniform Code of Military Justice.

If it is possible for a commanding officer to effect the *de facto* execution of a one year prison sentence prior to the completion of the military appellate process, the integrity of that process is seriously compromised.

A. Development of the Military Appellate Process

During the past 40 years, appellate jurisdiction has passed from a field officer to a three judge civilian court.

As long as there has been an American military establishment, it has provided that court martial sentences, especially those involving heavy penalties, may not be carried into execution until the appropriate appellate procedures have been completed.

B. Article 71(c) and Its Consistent Interpretation

Whenever the issue has arisen, military courts have condemned the "execution" of a sentence to confinement of one year or more prior to the completion of appellate review as a violation of Article 71(c) of the Uniform Code of Military Justice. *U. S.* v. *Smith,* 2 CMR 817 (1952); *U. S.* v. *Ranes,* 3 CMR 550 (1952); *U. S.* v. *Lucero,* 8 CMR 942 (1955).

C. The Meaning of "Execution" Under Federal Law

"Execution" of a sentence to confinement occurs upon the initiation of penal incarceration. *Sweet* v. *Taylor,* 178 F. Supp. 456 (D. Kans. 1959); *United States* v. *Murray,*

275 U. S. 347 (1928); *United States* v. *Affronti*, 350 U. S. 79 (1955). Confinement at Forth Leavenworth is clearly "penal incarceration".

III. The Confinement of Captain Noyd at Cannon Air Force Base "Pending Appeal" Violated the Uniform Code of Military Justice.

Military law provides that post conviction military personnel may not be subjected to any restraint pending appeal more vigorous than is necessary to insure their physical presence. Article 13 UCMJ, 10 U. S. C. 813; ¶18b(3) MCM.

Any restraint more vigorous is, by definition, punitive and constitutes the premature execution of a sentence to confinement. Article 71(c) UCMJ, 10 U. S. C. 871(c).

Since no one has ever intimated the slightest fear that Captain Noyd would refuse to obey the mandate of an appellate tribunal, his confinement at Cannon Air Force Base could not be labelled as anything other than punitive. As such, it was illegal.

IV. The Continued Incarceration Imposed Upon Captain Noyd Pending Completion of the Military Appellate Process Deprived Him of His Liberty Without Due Process of Law Since No Tribunal—Civilian or Military—Has Accepted the Responsibility of Passing Upon the Merits of His Defense.

In *Noyd* v. *McNamara*, 373 F. 2d 538 (10th Cir. 1967), cert. den. 389 U. S. 1022 (1967), the 10th Circuit directed Captain Noyd to present his defenses to a court martial before seeking relief in a Federal court.

In *U. S.* v. *Noyd*, —— CMR ——, ACM 20121, see App. p. 35, Captain Noyd's court martial disclaimed jurisdiction over his defenses and directed him to the Federal court.

Despite the failure of either the 10th Circuit or the military court to pass on the merits of his defense, Captain Noyd was imprisoned pending appeal.

In *Noyd* v. *Bond*, 402 F. 2d 441 (10th Cir. 1968), the 10th Circuit refused to order Captain Noyd freed pending appeal.

The cumulative effect of the reciprocal solicitude which the 10th Circuit and the Military courts have entertained for each others' jurisdictional purity has been the unconstitutional incarceration of Captain Noyd for over nine months without ever having afforded him a hearing on his defense.

V. This Case Is Not Moot.

Captain Noyd's sentence to confinement has not expired because it was tolled by Mr. Justice Douglas' order releasing him from confinement on December 24, 1968. This Court has inherent power to toll the running of a sentence in aid of its jurisdiction. *United States* v. *United Mine Workers of America*, 330 U. S. 258 (1947). Under military law, a sentence to confinement is tolled when a military prisoner is free of restraint. ¶97c MCM; *United States* v. *Bryant*, 30 CMR 133 (1961).

Even if Captain Noyd's sentence had expired, the "continuing circumstances" doctrine would prevent this appeal from becoming moot. *Bus Employees* v. *Missouri*, 374 U. S. 74 (1963).

POINT I

The Court of Appeals improperly denied relief on the grounds of failure to exhaust military remedies, although such doctrine, of dubious validity in any event, has no application where the military authority acts outside its jurisdiction. Exhaustion is likewise not required since the asserted military remedies in this case would be inadequate, ineffective and impractical. The Court of Appeals' constricted jurisdictional holding is in conflict with decisions of other Courts of Appeals.

The Court of Appeals did not rule on the merits of petitioner's claim that he was ordered incarcerated in violation of military law.[5] Citing one Supreme Court decision, *Gusik* v. *Schilder,* 340 U. S. 128 (1950), and a number of its own prior decisions, it declined jurisdiction on the grounds that petitioner had not exhausted all possible military remedies. The Tenth Circuit stated it to be "well established . . . that habeas corpus is not available to review military confinement until after all remedies afforded by the UCMJ have first been exhausted." 402 F. 2d at 442, App., p. 25. But in *Gusik* v. *Schilder, supra,* this Court's declination of jurisdiction on grounds of non-exhaustion was in response to a petition which sought review of various errors in the court-martial proceedings. *Gusik* was not, as is this case, an attack on the lawfulness

[5] However, the citation by the Court of Appeals of three decisions of military Boards of Review, *U. S.* v. *Smith,* 2 CMR 817 (1952); *U. S.* v. *Ranes,* 3 CMR 550 (1952); and *U. S.* v. *Lucero,* 18 CMR 942 (1955), all of which uphold petitioner's contention that such confinement is unlawful, strongly suggests that the Court of Appeals agreed with the District Court on the merits. See discussion of merits in Point II, *infra.*

of the confinement, unconnected with any possible trial errors.

It may indeed be "well established" that habeas corpus is not available to review military *trials* until after exhaustion.[5] However, petitioner respectfully suggests that it is not at all well established that the bare question of military *confinement* itself—uncoupled with a collateral attack on the court-martial proceedings resulting in the confinement—is not amenable to Federal habeas corpus. See *Gallagher* v. *Quinn*, 363 F. 2d 301, 303 (D. C. Cir. 1966), cert. den. 385 U. S. 881 (1966); *Neary* v. *Greenough*, 120 F. Supp. 833, 838 (D. Me. 1954). In any event, this Court has never so held in *Gusik* or in any other decision. Moreover, the decision below that a Federal court is powerless, pre-exhaustion, to redress a blatant violation of Article 71(c) of the UCMJ is a case of "first impression." 89 S. Ct. 478 (per Mr. Justice Douglas).

(a) *Questionable applicability of exhaustion doctrine.*

(1) "Jurisdiction" and the exhaustion of military remedies.

The only justification offered by the Tenth Circuit for its holding is the reinvocation of the doctrine of exhaustion of military remedies. It is questionable, however, if the doctrine is as monolithic and ubiquitous as the Court below suggests. The doctrine as asserted in *Gusik* v. *Schilder*, 340 U. S. 128 (1950)[6] does not appear to have

[6] *Gusik* may very well be explained by the extraordinary conditions of military justice revealed in many of the early post-World War II cases. See *Servicemen in Civilian Courts*, 76 Yale L. J. 380, 383-385 (1966). A great public outcry against large-scale abuses led ultimately to the enactment of the Uniform Code of Military Justice in 1950. But one of the stopgap measures enacted by Congress was an amendment to the Articles of War which gave

been reaffirmed by this Court in the succeeding eighteen years, notwithstanding many opportunities to do so.

The case of *U. S. ex rel. Guagliardo* v. *McElroy,* 158 F. Supp. 171, 173 (D. D. C. 1958), 259 F. 2d 927 (D. C. Cir. 1958), aff'd 361 U. S. 281 (1960) is of particular significance. A civilian employee of the Air Force was charged with a violation of the UCMJ, tried by a general court-martial, found guilty and sentenced. Appellant admittedly did not exhaust the judicial processes available to him under the UCMJ prior to petitioning the United States District Court for the District of Columbia for a writ of habeas corpus. His substantive contention was that inasmuch as he was a civilian the military authorities lacked jurisdiction to try him and that accordingly, his confinement was unlawful.

The threshold question, however, was whether or not the decision of this Court in *Gusik, supra,* compelled a denial of relief because of the failure to exhaust military remedies. The District Court and the Court of Appeals for the District of Columbia both noted that the *Gusik* doctrine was substantially undercut, if not completely overruled by this Court's decisions in *Reid* v. *Covert,* 354 U. S. 1 (1957) and *U. S. ex rel. Toth* v. *Quarles,* 350 U. S. 11 (1955), since in those cases this Court had not raised *Gusik* as a bar to determining lack of military jurisdiction. Accordingly, the District Court held in *Guagliardo*:

> "This court cannot reasonably reach any conclusion other than that the Gusik case has been overruled *sub*

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the Judge Advocate General of each service vast power to order new trials and grant other relief. Faced with this specific recent expression of congressional intent, it is not difficult to understand a judicial reluctance to disregard the new remedy.

silentio by the Toth and Reid cases, insofar as it applies to the necessity of exhausting other available remedies in a case in which the jurisdiction of a court martial is challenged on constitutional grounds. Consequently the objection that the petitioner has failed to exhaust all of his remedies within the military system is overruled." 158 F. Supp. at 173.

The Court of Appeals for the District of Columbia affirmed, holding:

"Appellees contend that the jurisdictional question is prematurely raised because appellant has not exhausted the judicial processes available to him under the Uniform Code of Military Justice. They rely upon Gusik v. Schilder, 340 U. S. 128, 71 S. Ct. 149, 95 L. Ed. 146. But that case we think is inapposite, for there court-martial jurisdiction over the accused unquestionably existed since he was a member of the United States Army. He sought to attack collaterally a court-martial judgment because of alleged errors in the court-martial proceedings, without exhausting the administrative remedies available for their correction. Here, in contrast, the question is whether appellant is subject to court-martial jurisdiction at all. Habeas corpus proceedings were used to determine such a question in Reid v. Covert, 354 U. S. 1, 77 S. Ct. 1222, 1 L. Ed. 2d 1148, and United States ex rel. Toth v. Quarles, 350 U. S. 11, 76 S. Ct. 1, 100 L. Ed. 8. The point was not discussed, but in view of Gusik v. Schilder, supra, could not have been overlooked by the Supreme Court, especially as the Court in Reid v. Covert specifically noted that the petition was brought 'while Mrs. Covert

> was being held * * * pending a proposed retrial by court-martial * * *.' 354 U. S. at page 4, 77 S. Ct. at page 1124, 1 L. Ed. 2d 148. If appellees have no court-martial jurisdiction whatever over appellant the great Writ is available to release him from their custody." 259 F. 2d at 928-929.

This Court affirmed without any mention of exhaustion as a problem. 361 U. S. 281 (1960).

Other decisions of Federal Courts, both pre- and post-*Guagliardo,* are in accord with the doctrine that the rule of exhaustion of military remedies does not apply where military jurisdiction is attacked. Perhaps the strongest case is *Gallagher* v. *Quinn,* 363 F. 2d 301 (D. C. Cir. 1966), cert. den. 385 U. S. 881 (1966). In this action in the District Court for the District of Columbia, appellant sought a Federal Court order directing the Court of Military Appeals to grant review in a case where, pursuant to its discretionary authority, it had not granted review. The court expressly noted that appellant "is not without other though partial remedies within the military establishment." 363 F. 2d at 304. But it affirmed federal jurisdiction, notwithstanding the failure to exhaust, because "appellant does not challenge the trial itself", 363 F. 2d at 303, but only the constitutional validity of the UCMJ provision which denied him review as of right by the Court of Military Appeals.

Appellant's attack in *Gallagher* v. *Quinn* was thus directed at the jurisdiction of the military to hold him in alleged violation of his constitutional right to have review in the Court of Military Appeals. In this case, Captain Noyd's challenge to the jurisdiction of respondents to incarcerate him prior to the completion of his unquestioned

military appellate rights, and prior to any hearing on his principal defense, is so much clearer, *a fortiori.* See Points II-IV, *infra,* for a discussion of respondents' manifest lack of power to confine Captain Noyd pending appeal.

As Chief Judge Yankwich observed, whenever a military prisoner attacks jurisdiction "no question can be raised as to whether he has exhausted his remedies through channels". *In Re Yokoyama,* 170 F. Supp. 467, 468 (S. D. Calif., Cent. Div. 1959). In *Neary* v. *Greenough,* 120 F. Supp. 833 (D. Me. 1954) a marine sought habeas corpus, arguing that he had been previously discharged. The response to the writ alleged failure to exhaust military remedies under *Gusik.* The court pointed out, at p. 838:

> "Neary's habeas corpus application is directed against his detention in the service and not any detention under a court-martial conviction. Gusik v. Schilder . . . and related cases are limited to where the habeas corpus petitioner was attacking the court-martial proceedings without more. . . . Neary is not attacking the court-martial proceedings in this action."

Plainly, Captain Noyd is not attacking the court-martial proceedings in this action; his habeas corpus application is directed against the fact and the timing of his detention and not the proceedings of the court-martial which convicted him and ordered him detained. As Judge Harris observed in *Peck* v. *Carpenter,* 120 F. Supp. 560, 562 (N. D. Calif., S. Div. 1954), likewise rejecting a *Gusik* v. *Schilder* exhaustion claim, compelling the serviceman under such circumstances to use a pending administrative remedy "would result in a *suspension* of the writ of habeas corpus" (emphasis in original).

Obviously petitioner in this case does not seek habeas corpus to attack the many errors which he believes occurred in his court-martial proceedings. See *Neary* v. *Greenough, supra.* He is content to exhaust all his military remedies for the redress of those errors. Habeas corpus is sought so that if these errors are redressed on appeal, he will not have been deprived of this redress by intervening confinement.

(2) Exhaustion of remedies generally.

There is little difference conceptually if the remedy which one is told he must exhaust prior to judicial review is an "administrative" remedy, or a "state court" remedy, or a "military" remedy. The wooden application of the doctrine can often have the effect, as in this case, of rendering a right remediless; the litigant "becomes exhausted instead of the remedies"; *NLRB* v. *Marine Workers,* 391 U. S. 418, 425 (1968).[7]

Indeed, it is now universally recognized that the doctrine that administrative remedies must be exhausted before resorting to the courts is not a rule of constitutional or even of statutory dimension. It came into being simply as a device of judicial policy and convenience adopted by the courts and will not be applied in a hidebound fashion. Since it is a judge-made rule, it will be disregarded by courts whenever there is a good reason to do so. "The requirement of exhaustion is a matter within the sound discretion of the courts." *NLRB* v. *Marine Workers, supra* at 426. See *Natural Gas Pipeline Co.* v. *Slattery,* 302 U. S. 300 (1937); *Lockhart* v. *U. S.,* —— F. 2d ——, 37 U. S.

[7] "Exhaustion . . . is not without certain overtones of Kafka." Shapiro, *The Supreme Court and Administrative Agencies* 116 (1967).

Law W. 2269 (9th Cir., Oct. 23, 1968). "The statement that courts so often repeat in their opinions—that judicial relief must be denied until administrative remedies have been exhausted—is seriously at variance with the holdings." 3 Davis, *Administrative Law Treatise*, §20.01, at 56 (1958).[8]

This Court and lower Federal courts have not required exhaustion:

(a) where the agency, tribunal, or other imposer of sanctions acted plainly beyond its jurisdiction or contrary to law, *Oestereich* v. *Selective Service System Local Board No. 11*, 89 S. Ct. 414, 416 (1968); *McCullouch* v. *Sociedad Nacional*, 372 U. S. 10, 16-17 (1963); *Leedom* v. *Kyne*, 358 U. S. 184, 188-189 (1958); *Public Utilities Commission* v. *United Fuel Gas Co.*, 317 U. S. 456, 469 (1943) (. . . the orders . . . are on their face plainly invalid); *Smith* v. *Illinois Bell Telephone Co.*, 270 U. S. 587, 591 (1926) (" . . . an entire lack of that acute appreciation of justice which should characterize a tribunal. . . . "); *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557, 562 (1919) (contention that "the Commission has exceeded its statutory powers");

(b) where "the administrative remedies are inadequate", *NLRB* v. *Marine Workers*, 391 U. S. 418, 426 (1968); *Damico* v. *California*, 389 U. S. 416 (1967) (reversing dismissal of complaint, on grounds of non-exhaustion, by three-judge court); *McNeese* v. *Board of Education*, 373 U. S. 668, 676 (1963) (state remedy provided only "tenuous" protection); *Monroe* v. *Pape*, 365 U. S. 167, 183 (1961) ("The federal remedy is

[8] For a discussion of the "flexibility" of the exhaustion doctrine see Shapiro, *supra*, at 112-116.

supplementary to the state remedy and the latter need not be first sought and refused before the federal one is invoked."); *Hillsborough* v. *Cromwell*, 326 U. S. 620, 625-626 (1945) ("There is such uncertainty concerning the New Jersey remedy as to make it speculative . . . whether the State affords full protection to the federal rights."); 3 Davis, *supra*, §20.07;

(c) where the delay inherent in exhaustion would cause irreparable injury, *Smith* v. *Illinois Bell Telephone Co., supra;* Jaffe, *Judicial Control of Administrative Action* 429 (1965) ("Irreparable injury in its strictest sense is the probable loss, if exhaustion is required, of the value . . . of an asserted right or defense."); and

(d) where attempted exhaustion would be a futility, *Levers* v. *Anderson*, 326 U. S. 219, 223-224 (1945); *Hammond* v. *Lenfest*, 398 F. 2d 705, 713 (2d Cir. 1968); *Wolff* v. *Selective Service Local Board No. 16*, 372 F. 2d 817 (2d Cir. 1967); *School Board of Charlottesville* v. *Allen*, 240 F. 2d 59, 63-64 (4th Cir. 1956); Jaffe, *supra*, at 449.

As shall be demonstrated, *infra*, in this case the purportedly unexhausted remedies would be totally inadequate, dilatory, and futile. But even if these factors were not present, since the respondent convening authority acted plainly beyond his jurisdiction and in clear violation of a statutory right provided by Congress, there is no requirement of exhaustion in any case. "The case we decide today involves a clear departure . . . from . . . statutory mandate." *Oestereich* v. *Selective Service System Local Board No. 11*, 89 S. Ct. 414, 416 (1968).

(b) *Inadequacy and ineffectiveness of suggested military remedies.*

The possible military remedies which the Court below noted included review by an Air Force Board of Review;[9] further review, upon grant of petition therefor, by the Court of Military Appeals;[10] and application for an extraordinary writ to the Court of Military Appeals. None of these suggested remedies can provide the adequate, effective and practical relief which is available through Federal habeas corpus.

(1) Inadequacy of normal appellate process.

In the Board of Review decisions cited by the Court below, relief was indeed granted, but only after varying periods of unlawful incarceration while awaiting decision. In *U. S.* v. *Smith,* 2 CMR 817 (1952), the intervening period was 5½ months; in *U. S.* v. *Ranes,* 3 CMR 550 (1952), it was 2½ months; in this case, had the Board of Review reversed, it would have meant that petitioner would have nonetheless been illegally confined from March 9, 1968 to September 3, 1968, almost six months of a one-year sentence.

Federal habeas corpus relief, on the other hand, can be and in this case was, instantaneous and effective. GCMO 13, the Leavenworth confinement order, was issued May

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[9] The observation of the Court below that the Board of Review had heard oral argument but not yet rendered its decision is inaccurate. Oral argument before the Board of Review was on August 22, 1968; its decision was handed down on September 3, 1968. Argument before the Court below was on October 2, 1968, and its decision was filed on October 30, 1968.

[10] The Court of Military Appeals granted review on two of the four questions presented.

10, 1968. Petitioner promptly obtained a show cause order from the District Court, which contained a stay. Briefs were presented, the matter was heard, and the Court rendered its decision on May 24, 1968, fourteen days after the Leavenworth confinement order was issued.

The length of the record, the complexity of the issues, and the technical problems of preparing for a full appellate review on the merits are all factors which will bear on the length of illegal incarceration, if this were to be the only remedy. Utilization of this remedy would tend to pressure counsel for an unlawfully incarcerated accused to press for speedy review on the question of confinement and not take the time to adequately review, research and prepare for the other questions.

For obvious reasons, awaiting review on the merits by the Court of Military Appeals could not possibly produce relief, in most cases, until approximately a year after conviction.[11]

The inherent delay in the normal military appellate process is vividly demonstrated by the recurring phenomena of the Court of Military Appeals reversing a court-martial conviction, and then, noting that the total confinement has already been served, stating that a new trial would be pointless. See, e.g., *United States* v. *McLaughlin,* 18 USCMA 61, 39 CMR 61 (1968); *United States* v. *Rowe,* 18 USCMA 54, 39 CMR 54 (1968) (6 months' confinement); *United States* v. *Sheeks,* 16 USCMA 430, 37 CMR 50 (1968)

[11] The court-martial record of the five-day trial in this case consists of 402 pages, plus several hundred unnumbered pages of exhibits. Petitioner filed his petition for grant of review on November 22, 1968. Review was granted on January 23, 1969. It is unlikely that the case will be set for oral argument prior to May 1969.

(2 years' confinement reduced by convening authority to one year, and by Board of Review to nine months). See generally any volume of reported decisions of Court of Military Appeals, *passim*.

(2) Inadequacy of extraordinary writ application to Court of Military Appeals.

The third suggested military remedy is the application for an extraordinary writ to the Court of Military Appeals in the light of its holding in *Levy* v. *Resor*, 17 USCMA 135, 37 CMR 399 (1967), and other cases,[12] that it has jurisdiction to hear such writs. But the Court below, we respectfully contend, overlooked a number of serious practical difficulties which would be created by establishing the Court of Military Appeals as the exclusive forum within which a military prisoner may challenge the lawfulness of his detention pending appeal:

(1) A jurisdictional requirement which funnels virtually all military habeas corpus applications through the Court of Military Appeals would place an extraordinary strain upon the facilities of that Court. The Court of Military Appeals is a three judge appellate tribunal. It lacks both the facilities and the manpower to accommodate the vast increase in evidentiary hearings which such a jurisdictional rule would entail. At the present time, the Court is obliged by the pressure of cases to regulate its appellate caseload by the judicious use of its discretionary power to grant review "upon petition of the accused and on good cause shown" UCMJ, Art. 67(b)(3); 10 U. S. C. §867(b)(3). To the extent that the Court is burdened as the exclusive forum

[12] See *United States* v. *Bevilacqua*, 18 USCMA 10, 39 CMR 10 (1968); *Gale* v. *United States*, 17 USCMA 40, 37 CMR 304 (1967); *United States* v. *Frischholz*, 16 USCMA 150, 36 CMR 306 (1966).

from which all military habeas corpus petitions must be launched, it will be correspondingly less able to fulfill its primary role of appellate tribunal.[13]

(2) The very nature of a *habeas corpus* writ requires the presence of the petitioner at his hearing. However, it would be extremely impracticable for military authorities to transport prisoners great distances to Washington, D. C. to appear before the Court of Military Appeals. Cf. *Johnson* v. *Eisentrager*, 339 U. S. 763 (1950):

> "A basic consideration in habeas corpus practice is that the prisoner will be produced before the court. This is the crux of the statutory scheme established by Congress; indeed, it is inherent in the very term 'habeas corpus'. And though production of the pris-

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[13] During the fiscal year 1967, 794 cases were presented to the Court of Military Appeals for review. Of that number, 30 were forwarded on certificates of a Judge Advocate General. Of the remaining 764 cases, the Court granted review in 102 cases. *Annual Report of the U. S. Court of Military Appeals, and the Judge Advocates General . . . etc. . . . For the period July 1, 1967 to December 31, 1967*, p. 5. Thus, the Court of Military Appeals was able to review only 13% of the cases presented to it. If it were burdened, in addition to its appellate caseload, with the inevitable avalanche of habeas corpus cases which would result from a determination that all military habeas petitions must originate in the Court of Military Appeals, its primary appellate function would be seriously undercut.

During the 1967 Term, this Court disposed of 2946 cases. Of that number, 455 were disposed of on the merits and the remainder were disposed of by the denial or dismissal of a petition for certiorari. The Supreme Court, 1967, 82 Harv. L. Rev. 303 (Table 1). Therefore, this Court was able to review approximately 15% of the cases presented to it. If, suddenly, this Court were burdened with a spate of cases requiring it to hold evidentiary hearings, in addition to its appellate caseload, it would, of course, be severely taxed beyond its physical capability. Yet that is precisely the impact which a decision requiring all military habeas corpus petitions to originate in the Court of Military Appeals would have upon that court.

oner may be dispensed with where it appears on the face of the application that no cause for granting the writ exists [citing cases] we have consistently adhered to and recognized the general rule." 339 U. S. at 778.[14]

(3) It will be virtually impossible for military prisoners to secure civilian counsel to initiate a writ in the Court of Military Appeals. It would be prohibitively expensive for a military prisoner detained in New Mexico or Hawaii, for example, to secure civilian counsel willing to travel to Washington, D. C. in order to initiate a habeas corpus proceeding.

(4) The Court of Military Appeals does not sit during the summer months. The very fact that the Court of Military Appeals recesses for the summer indicates that it does not view itself as the exclusive forum within which to initiate a habeas corpus writ challenging the legality of military detention.

(3) Hesitant quality of Court of Military Appeals practice on extraordinary writ application.

Moreover, even if these practical obstacles did not exist, there would be a serious question as to whether the Court of Military Appeals could be expected to grant habeas

[14] Even under motions pursuant to 28 U. S. C. §2255, in lieu of habeas corpus, this has ruled that a defendant's presence at a §2255 hearing is required whenever an issue of fact is to be determined. *United States* v. *Hayman*, 342 U. S. 205 (1952). In *Hayman*, this Court noted that a major purpose underlying the enactment of §2255 was to alleviate the congestion caused by the prior practice of requiring post-conviction applications to be heard in the district of confinement by effecting a decentralization of habeas corpus applications. Requiring all military habeas corpus applications to be centrally heard by the Court of Military Appeals would create the same kind of evil which Congress sought to remedy via §2255.

corpus relief with the same "solicitude for the vigor of the Great Writ," *Johnson* v. *Avery*, 37 U. S. Law W. 4128, 4129 (Feb. 24, 1969), as is regularly demonstrated by Federal courts.

The Court of Military Appeals has asserted that it can exercise habeas corpus jurisdiction,[15] and this Court has noted such assertion, see *United States* v. *Augenblick*, 89 S. Ct. 528, 531 (1969). But the history of the Court of Military Appeals' performance on applications for a habeas corpus writ does not yet show a single instance of the writ being sustained.[16] It is one thing to assert that "an accused who has been deprived of his rights need not go outside the military justice system to find relief in the civilian courts of the Federal judiciary"; *United States* v. *Bevilacqua*, 18 USCMA 10, 12, 39 CMR 10, 12 (1968);[17] see *United States* v. *Augenblick, supra.* It is another thing to actually demonstrate that it is disposed to grant the relief. Saying so doesn't make it so.[18]

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[15] See *Levy* v. *Resor, supra,* and cases cited in fn. 12 *supra.*

[16] *Ibid.*

[17] In *Bevilacqua,* the Court of Military Appeals, after making this broad assertion, and citing two Federal court decisions which severely criticized military justice, *Application of Stapely,* 246 F. Supp. 316 (D. Utah, 1965), and *Ashe* v. *McNamara,* 355 F. 2d 277 (1st Cir. 1965), proceeded to deny relief.

After the decision of the Court below, counsel for Dr. (Captain) Howard Levy filed a petition for a writ of habeas corpus with the Court of Military Appeals challenging the legality of Dr. Levy's incarceration at Fort Leavenworth during the pendency of his military appeal. The petition alleged that such incarceration was a clear violation of Article 71(c). The Court denied the writ five days after the petition was filed without permitting either briefs or oral argument. No opinion was rendered. Dr. Levy's challenge to his incarceration at Fort Leavenworth is currently pending in the Tenth Circuit. See *Levy* v. *Dillon,* #78-68 (pending before Tenth Cir.).

[18] At least two Federal Courts of Appeals have noted the silence of the Court of Military Appeals on the crucial question of whether

Petitioner has no reason to doubt that, in good time, the Court of Military Appeals will, in practice, entertain and grant habeas corpus applications with the same vigor as that exhibited by Federal courts. The Court of Military Appeals has certainly shown that, in the exercise of its regular appellate jurisdiction, it stands ready to guarantee and enforce the constitutional rights of servicemen. See *United States* v. *Tempia,* 37 CMR 249 (1967); cf. Warren, "The Bill of Rights and the Military", 37 N. Y. U. L. Rev. 181, 189 (1962). But the development of a new jurisdictional head is always a slow process. See *Monroe* v. *Pape,* 365 U. S. 167 (1961). It is therefore no criticism of the Court of Military Appeals, but merely a recognition of the inherent limitations in the process of jurisdictional evolution, to contend, as petitioner does, that at this time in history, the Court of Military Appeals is not a tribunal which can provide adequate, effective and practical relief.

(4) No bar, by way of comity or otherwise, to concurrent habeas corpus jurisdiction.

Finally, even if the Court of Military Appeals should eventually fulfill the promise it made in the *Bevilacqua* case, and relieve the frustration caused by its failure to act heretofore, it has never claimed, in *Bevilacqua* or elsewhere, that it should have *exclusive* habeas corpus jurisdiction in cases involving military prisoners. As the Court

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a wrongful denial of conscientious objector classification can be asserted as a defense to a court-martial prosecution for disobedience of an order. *Brown* v. *McNamara,* 387 F. 2d 150, n. 5 (3d Cir. 1967), cert. den. 390 U. S. 1005 (1968); *Hammond* v. *Lenfest,* 398 F. 2d 705, 713 (2d Cir. 1968). In *United States* v. *Noyd,* petitioner's direct appeal from his court-martial conviction, the Court of Military Appeals has indeed granted review, and specified this very question as one on which review was granted. But whether the grant of review will result in a grant of relief is yet to be seen.

of Claims has aptly observed, ". . . the existence of the Court of Military Appeals does not preclude consideration by this court. . . ." *Augenblick* v. *United States,* 377 F. 2d 586, 593 (Ct. Clms. 1967), rev'd on other grounds, 80 S. Ct. 528 (1969).

There is no reason, in law or judicial policy, why habeas corpus jurisdiction over military prisoners cannot exist concurrently in the Court of Military Appeals and the Federal District Courts, just as concurrent jurisdiction has been recognized over state prisoners as between this Court and Federal District Courts. *Fay* v. *Noia,* 372 U. S. 391 (1963).

It may be argued that since, as a matter of comity, Federal District Courts have refrained from exercising habeas corpus jurisdiction until the state appellate processes have been exhausted, a similar notion of comity should apply to military situations.

However, it is well settled that the decision of the Federal courts to refrain from exercising habeas corpus jurisdiction prior to the completion of state appellate remedies is based upon the intrinsic respect which the Federal Government must accord to the sovereignty of the states of the union. In our Federal system, the states are supreme in their proper spheres of action. Therefore, it would be an affront to the federalist concept of mutual sovereignties for the Federal courts to presume to review the act of a sister sovereignty until that sovereignty has fully acted.

In the case of the Court of Military Appeals, however, there is but one sovereignty—the United States of America. Since comity, by definition, is the respect which one sovereign entity entertains for the acts of another, no principle of comity requires a Federal District Court to refrain from

exercising its traditional function as guardian of the liberty of any person unlawfully detained by an arm of the government of the United States. In fact, in *Fay* v. *Noia,* 372 U. S. 391 (1963), this Court ruled that it was not necessary for a state prisoner to unsuccessfully petition this Court for a writ of certiorari to the highest state appellate tribunal prior to seeking habeas corpus relief in a Federal District Court. *Fay* v. *Noia, supra,* is particularly instructive because it illustrates that the existence of one Federal remedy (appeal to the Supreme Court of the United States) does not prevent a Federal District Court from exercising concurrent habeas corpus jurisdiction. Since *Fay* v. *Noia, supra,* held that a parallel Federal remedy in the Supreme Court would not bar concurrent habeas corpus jurisdiction in the Federal District Court, it follows, *a fortiori,* that the existence of a parallel Federal remedy in the Court of Military Appeals cannot bar concurrent habeas corpus jurisdiction in a Federal District Court.[19]

The issue here is not whether the Court of Military Appeals might have had jurisdiction to grant relief in this case. It is rather whether the Federal Court in New Mexico was *denied* jurisdiction. The history of this case, as well as the preceding discussion, amply supports the conclusion of Chief Judge Payne that:

> "; . . the circumstances present here are such as to render the military remedy process ineffective to protect the petitioner's rights." 285 F. Supp. at 788, App., p. 20.

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[19] Another example of parallel Federal remedies is the concurrent jurisdiction which the Tax Court and the Federal District Court possess in the area of Federal taxation. Compare, 28 USC 1346(a) with IRC §7441, et seq. (1954).

(c) *Conflict between the circuits.*

In the light of the marginal residual validity of the exhaustion doctrine, especially in situations where the challenged action is clearly beyond the power of the agency in question, and the plain inadequacy and ineffectiveness of the purported military remedies, it is not surprising that a conflict has developed between the Court below, and other courts of appeals on the question of whether the doctrine of exhaustion precludes Federal habeas corpus for American military personnel.

In *Noyd* v. *McNamara,* 378 F. 2d 538 (10th Cir. 1967), cert. den. 389 U. S. 1022 (1967), and again in *Noyd* v. *Bond,* 402 F. 2d 441, the Court below adopted an extraordinarily restrictive view of the power and duty of the Federal courts in this area. The Tenth Circuit, in *Noyd* v. *McNamara, supra,* declined to rule on the merits of Captain Noyd's substantive defenses prior to his court-martial, and now in *Noyd* v. *Bond,* has prevented a Federal District Court from enjoining petitioner's premature incarceration pending appeal.

In *Hammond* v. *Lenfest,* 398 F. 2d 705 (2d Cir. 1968), however, the Second Circuit adopted a jurisdictional position squarely at variance with that of the Tenth Circuit. In *Hammond* v. *Lenfest, supra,* the Second Circuit ruled that a serviceman was not obliged to submit to a court-martial prior to raising his defense of conscientious objection in a Federal court. In so holding, the majority explicitly rejected the reasoning of the Tenth Circuit in *Noyd* v. *McNamara.* See also, *U. S. ex rel. Mankiewicz* v. *Ray,* 399 F. 2d 900 (2d Cir. 1968).

In *In re Kelly*, —— F. 2d ——, 37 U. S. Law W. 2165 (5th Cir., Aug. 30, 1968), the Fifth Circuit also explicitly rejected the reasoning of the Tenth Circuit in *Noyd* and chose to adopt the reasoning of the Second Circuit in *Hammond*. The Fifth Circuit stated:

> "In Noyd v. McNamara, . . . the Tenth Circuit considered the courts were without jurisdiction to entertain the suit pending exhaustion of military justice procedures. In Hammond v. Lenfest, 36 U. S. Law W. 2765 (2d Cir., June 10, 1968), the Second Circuit, in a 2-1 decision, rejected Noyd and went the other way . . .
>
> "We view the requirement of exhaustion as did the majority in Hammond. . . ."

See also *Powers* v. *Powers*, 400 F. 2d 438 (5th Cir. 1968); *Brown* v. *McNamara*, 387 F. 2d 150, 153, n. 5 (3d Cir. 1967), cert. den. 390 U. S. 1005 (1968); *Crane* v. *Hedrick*, 284 F. Supp. 250 (N. D. Calif. 1968).

Thus, a sharp conflict between the circuits exists as to the nature and extent of the duty of Federal courts to entertain applications for writs of habeas corpus challenging the lawfulness of military detention. In view of the extraordinary importance of the writ of habeas corpus,[20]

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[20] "This Court has constantly emphasized the fundamental importance of the writ of habeas corpus in our constitutional scheme . . . ." *Johnson* v. *Avery*, 37 U. S. Law W. 4128, 4129 (Feb. 24, 1969). " . . . its history is inextricably intertwined with the growth of fundamental rights of personal liberty. For its function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints. Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment can-

petitioner respectfully urges that this Court should declare that the Tenth Circuit is wrong, and that the Second, Third and Fifth Circuits are right.[21]

In addition, the restrictive jurisdictional position of the Tenth Circuit ignores a well-established body of case law which upholds Federal habeas corpus jurisdiction to review the propriety of military post-conviction restraint. *Gibbs* v. *Blackwell*, 354 F. 2d 469 (5th Cir. 1965); *Levy* v. *Resor*, —— F. Supp. —— (D. S. C. 1967), aff'd 384 F. 2d 689 (4th Cir. 1967), cert. den. 389 U. S. 1049 (1968); *Levy* v. *Dillon*, —— F. Supp. —— (L-543, D. Kans., July 29, 1968, #78-68, 10th Cir., argued Jan. 21, 1969); see *Green* v. *Schilder*, 162 F. 2d 803 (10th Cir, 1947); *Kelly* v. *Hunter*, 80 F. Supp. 851 (D. Kans. 1948); *Sweet* v. *Taylor*, 178 F. Supp. 456 (D. Kans. 1959). In all of these cases, regardless of the ultimate decision on the merits, Federal courts accepted jurisdiction notwithstanding the absence of total exhaustion of all military remedies.

Finally, the Tenth Circuit's jurisdictional position casts doubt upon the established procedure of submitting to induction and challenging the validity of the induction order by an application for a writ of habeas corpus to the appropriate Federal District Court. See *Witmer* v. *United*

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not be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release." *Fay* v. *Noia*, 372 U. S. 391, 401-402 (1963).

[21] The Chief Justice has observed that:

> "When the authority of the military has such a sweeping capacity for affecting the lives of our citizenry, the wisdom of treating the military establishment as an enclave beyond the reach of civilian courts almost inevitably is drawn into question." Warren, *The Bill of Rights and the Military*, 37 N. Y. U. L. Rev. 181, 188 (1962).

States, 348 U. S. 375 (1955); *Eagles* v. *United States ex rel. Samuels*, 329 U. S. 304 (1946); *Gibson* v. *United States*, 329 U. S. 338, 359 (1946). According to the rationale of the Tenth Circuit, such applications may not be heard in a Federal Court until the applicants have exhausted every conceivable military forum, including court-martial proceedings. See *Noyd* v. *McNamara, supra.* Such a result would be an unconstitutional suspension of the writ of habeas corpus. See *Gusik* v. *Schilder, supra*, 340 U. S. at 132; *Hammond* v. *Lenfest, supra*, 398 F. 2d at 713-714.

POINT II

General Court Martial Order #13 ordering Captain Noyd confined in the United States Disciplinary Barracks at Fort Leavenworth "pending completion of appellate review" violated the Uniform Code of Military Justice.

Article 71(c) of the Uniform Code of Military Justice, 10 U. S. C. §871(c) provides:

> "No sentence which includes, unsuspended, a dishonorable or bad-conduct discharge, or confinement for one year or more, may be executed until affirmed by a board of review and, in cases reviewed by it, the Court of Military Appeals."

Since Captain Noyd was sentenced to one year's confinement and dismissal from the service, he clearly falls within the protection of Article 71(c). Insofar as the "dismissal" aspects of Captain Noyd's sentence are concerned, the Air Force authorities have fully complied with Article 71 and have made no attempt to execute the dismissal. Un-

fortunately, they have not shown as scrupulous a regard for the impact of Article 71 upon the confinement aspects of his sentence. In disregard of the wording of Article 71(c), appellees confined Captain Noyd at Cannon Air Force Base since March 9, 1968, and, on May 10, 1968, attempted to intensify that incarceration by ordering him imprisoned in the United States Disciplinary Barracks at Fort Leavenworth, Kansas, "pending the completion of appellate review." GCMO #13, App., p. 30. Only the intervention of the Federal District Court for the District of New Mexico, in response to Captain Noyd's petition for a writ of habeas corpus, prevented the incarceration of Captain Noyd in Fort Leavenworth. *Noyd* v. *Bond,* 285 F. Supp. 785 (D. N. Mex. 1968). The propriety and correctness of that Court's act is now at issue before this Court.

Often, when civilian courts become embroiled in military matters, an argument may be advanced that the unique character of the military establishment requires that civilian courts abstain from interference whenever possible. See, *Noyd* v. *Bond,* 402 F. 2d 441, 443, n. 6 (10th Cir. 1968) (App., p. 22). Such an argument is particularly inappropriate in this case because the power of the civilian judiciary has been invoked, not in derogation of military law, but rather in support of the integrity of the military appellate process as provided by the Uniform Code of Military Justice. 10 U. S. C. 800 *et seq.* If it is possible, as was attempted here, for a commanding officer to effect the *de facto* execution of a one year prison sentence prior to the completion of the military appellate process, in direct violation of the Uniform Code of Military Justice, the integrity of that appellate process is seriously compromised, if not destroyed.

A. *Development of the Military Appellate Process*

The adoption of the Uniform Code of Military Justice in 1951 climaxed a 40-year period in the evolution of military justice, during which appellate jurisdiction passed from a commanding officer in the field to an independent, civilian court in Washington, D. C.

Prior to World War I, appellate review of military court martial proceedings was generally confined to the field officer who convened the court. *Articles of War,* 46 (1916); 39 Stat. 650, 657-8.

During the summer of 1917, a group of Negro soldiers were tried at Fort Sam Houston, Texas, on charges arising out of a disturbance on the military base. The field officer who convened the court martial reviewed the daily transcripts of the trial and, after a finding of guilty and a sentence of death, ordered the soldiers executed two days after the court martial ended. Upon subsequent review, the Army's Judge Advocate General found that grave doubt existed concerning the legality of the entire proceeding. The public outcry was enormous. See, e.g. Post, *What Is a Crime,* The Independent and Weekly Review, April 5, 1919, p. 13; *The Injustice of Military Justice,* The Literary Digest, April 12, 1919; *New York World,* January 19, 1919; 57 Cong. Rec. 877-78 (1918); 57 Cong. Rec. 3387-92, 3809, 4502-08 (1919); 57 Cong. Rec. App. 279-281 (1919); 58 Cong. Rec. 3938-40 (1919).

The "Houston Massacre," as the incident came to be known, coupled with a comparable occurrence at Fort Bliss, Texas, involving long prison terms precipitated a torrent of criticism which impelled the War Department to issue General Order #7, providing that after February 1, 1918, all court martials resulting in either death or dishonorable

discharge would be subject to appellate review by a military Board of Review appointed by the Judge Advocate General.

The experience of World War I resulted in general agreement that statutory provision for appellate review of court martial cases was desirable. See generally, Brown, *The Crowder-Ansell Dispute—The Emergence of General Samuel T. Ansell*, 35 Mil. L. Rev. 1 (1967). Consequently, the 1921 re-codification of the Articles of War provided that in cases involving a general officer, dismissal, death, or sentence to a penitentiary the court martial record was to be reviewed by a Board of Review appointed by the Judge Advocate General. *Articles of War* 50½ (1921); 41 Stat. 787, 797; 10 USC 1472-1593 (1946).

Early in 1948, responding to widespread criticism of the operation of the military appellate system during the Second World War, Congress established a Judicial Council, comprised of senior military legal officials, to hear appeals from the Boards of Review. *Articles of War* 50 (1949); Title II, Selective Service Act of 1948 (June 24, 1948); Pub. L. 759, 80th Cong.; 62 Stat. 627.

Finally, with the adoption of the Uniform Code of Military Justice in 1951, Congress abolished the Judicial Council and, in its place, created the Court of Military Appeals, a three judge civilian appellate tribunal with jurisdiction to review the findings of a Board of Review.

Thus, during 40 years and two world wars, appellate jurisdiction over serious court martial offenses has been transferred from a field commander without legal training to an independent civilian court. The establishment of a

civilian court to oversee military justice has rightfully been hailed as among the most significant steps in the history of military jurisprudence. Brown, *The Crowder-Ansell Dispute, supra.* At issue herein is whether this newly evolved civilian appellate procedure is to be reduced, in many cases, to a meaningless exercise in futility. For, if a military prisoner may be compelled to serve virtually his entire sentence in a maximum security military prison before his conviction may be reviewed by the civilian court, what meaningful purpose does that review serve?

The codifiers of American military law have recognized that if appellate review is to be meaningful, the execution of the sentence being appealed must be deferred until the completion of appellate review. Thus, since the Continental Congress of 1776, whenever a court martial sentence has been subject to review by some higher authority, be it a convening field officer, a Board of Review, the Court of Military Appeals, Congress, or the President, military law has provided that execution of that sentence must be deferred until completion of the appropriate review. Frachter, *Appellate Review in Military Law,* 14 Mo. L. Rev. 15 (1949).[22]

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[22] The prohibition upon the premature execution of court martial sentences paralleled the evolution of the military appellate process. The British Articles of War of 1774 provided that no sentences of a general court martial could be executed until reviewed by the King or his designees. *British Articles of War* of 1774, Section 15, Articles 10, 12, 13, 14. [Reprinted in Davis, *Treatise on the Military Law of the United States* (2nd ed. 1909).]

On September 20, 1776, on the advice of General George Washington, the Continental Congress adopted an almost literal version of the British Articles of War. Section XIV, Articles 3, 5 provided:

> . . . no sentence of a general court martial should be put into execution until confirmed by Congress or the general or com-

As long as there has been an American military establishment, it has provided that court martial sentences, especially those involving heavy penalties, may not be car-

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mander-in-chief of the forces of the United States." 7 *Journals of Continental Congress* 265.

In 1786, the Congress of the Confederation repealed the 1776 Articles of War and adopted the following provision:

"But no sentence of a court martial shall be carried into execution until after [review by field commander], neither shall any sentence of a general court martial in time of peace, extending to the loss of life, the dismission of a commissioned officer, or which shall in time of peace or war respect a general officer, be carried into execution [until after review by Congress]. All other sentences may be confirmed and executed by the officer ordering the court to assemble . . ." 30 *Journals of the Continental Congress,* 316-322 (Article II).

Apart from substituting Presidential for Congressional review in 1796, no substantial change was made in the "non-execution" provisions of military law until the Act of July 17, 1862, which provided:

"And no sentence of death, or imprisonment in the penitentiary, shall be carried into execution until the same shall have been approved by the President." 12 Stat. 598.

In 1916, the re-codification of military law provided:

"No sentence of a court martial shall be carried into execution until the same shall have been approved by the officer appointing the court . . ." Articles of War 46 (1916); 39 Stat. 650, 657-8.

* * * * *

"In addition to the approval required by article forty-six, confirmation by the President is required in the following classes of cases before the sentence of a court martial is carried into execution, namely:

[(a) sentences affecting general officers]

[(b) dismissals of officers]

[(c) dismissals of cadets]

[(d) death sentences]" *Articles of War* 48 (1916). 39 Stat. 650, 658.

The requirement of Presidential review of death sentences was inapplicable during time of war. This unfortunate omission permitted the occurrence of the "Houston Massacre." See p. 45 *supra.*

(continued on next page)

ried into execution until the appropriate appellate procedures have been exhausted. As we have seen, those appellate procedures have expanded during the first half of this century to include review by a legally trained civilian tribunal.

If military authorities are permitted to incarcerate military prisoners at Fort Leavenworth prior to the completion of appellate review, this painfully evolved appellate procedure will have been dealt a crippling blow. If respondents' position is sustained it will, in effect, negate 40 years of legal evolution. Once again, just as before World War I, meaningful review in most cases will be confined to the field officer who convenes the court martial, for his decision to "temporarily" imprison a military prisoner in a maximum security prison "pending appeal" will have the practical effect of forcing that prisoner to serve his sentence *de facto* prior to any decision on his appeal.

General Order #7, promulgated by the War Department in February, 1918, prohibited the execution of sentences extending to death, dismissal or dishonorable discharge until review by the Board of Review. Thus, General Order #7, for the first time, stayed the execution of serious court martial sentences pending review by a legally trained appellate tribunal.

In 1921, Congress once again re-codified military law incorporating the substance of General Order #7. See, generally, *Articles of War* 46, 48 and 51 (1921); 41 Stat. 787, 797.

In 1948, Congress provided that life sentences could not be executed prior to review by the Judicial Council. Sentences involving a dishonorable discharge or imprisonment in a penitentiary could not be executed until affirmed by a Board of Review. See, generally, *Articles of War* 47 and 48 (1948); 62 Stat. 627.

Finally, in 1951, Congress adopted the Uniform Code of Military Justice, which expressly barred the execution of death sentences, dismissals, dishonorable discharges and jail sentences of one year or more until the completion of military appellate review. Article 71, UCMJ; 10 USC §871.

B. *Article 71(c) and Its Consistent Interpretation*

Given the importance of Article 71 in protecting the integrity of the painfully evolved military appellate process, it is not surprising that whenever the issue has arisen, military appellate tribunals have ruled that Article 71(c) prohibits the imposition of penal incarceration until the completion of military appellate review.

In *United States* v. *Smith,* 2 CMR 817 (1952), the defendant was sentenced by a Court Martial to one year's imprisonment and a bad conduct discharge. The convening authority approved the sentence and ordered the defendant to the United States Disciplinary Barracks at Cumberland, Pa., suspending only the bad conduct discharge pending appellate review. The Board of Review stated:

> "The action of the convening authority insofar as it purports to order into execution that portion of the approved sentence involving confinement, unsuspended, for twelve (12) months is void." *Id.* at 822.

In *United States* v. *Ranes,* 3 CMR 550 (1952), *pet for rev den* 3 CMR 150 (1952), the Air Force Board of Review was faced with a defendant who had been sentenced to a dishonorable discharge and confinement to the Base Guardhouse at Reese Air Force Base for one year. The convening authority approved the confinement and ordered it executed. The Air Force Board of Review stated:

> "... the sentence of the court included confinement for one year, and the convening authority purported to order this sentence into execution, suspending only the execution of the dishonorable discharge. The Uniform Code of Military Justice, Article 71(c) provides that

no sentence 'which includes, unsuspended, a dishonorable or bad-conduct discharge, or confinement for one year or more shall be executed until affirmed by the Board of Review and, in cases reviewed by it, the Court of Military Appeals.' The same prohibition is contained in ¶98 of the Manual for Courts Martial and is implicit in ¶88(d) of the Manual for Courts Martial . . . Therefore, that part of the action of the convening authority purporting to direct execution of the sentence is illegal." *Id.* at 551.

In *United States* v. *Moyer,* 3 CMR 667 (1952), the defendant was sentenced to one year's confinement. The Board of Review, citing Article 71(c) of the UCMJ, and ¶88(d) and ¶98 of the MCM stated:

"It is clear that the purported action of the convening authority ordering execution was invalid." *Id.* pp. 673-674.

The cases of *United States* v. *Sarae,* 9 CMR 633 (1953) and *United States* v. *Lucero,* 18 CMR 942 (1955) provide an excellent insight into the operation of Article 71(c) upon sentences of one year or more. In both cases, the defendants were convicted by court martial and sentenced to a substantial fine, or, imprisonment of one year. In *Sarae,* the convening authority approved the sentence and ordered the confinement executed until the fine was paid. The Board of Review held that since the one year's confinement was not punitive, but merely to compel payment of a fine, 71(c) did not prohibit execution of confinement prior to appellate review. In *Lucero,* however, the Board reversed its decision in *Sarae* and, ordering Lucero released from confinement, stated:

> "It is inescapable that where there is the possibility that the sentence may extend to a year or more, the sentence may not be executed by the convening authority until appropriate appellate review has been completed." *Id.* at 943.

See, also, *United States* v. *Garcia,* 17 CMR 88 (1954). The import of the *Sarae-Lucero* decisions is clear: No punitive incarceration may be imposed upon a military prisoner sentenced to one year or more until the completion of his military appeals.

In *United States* v. *Hightower,* 14 CMR 908 (1954), the defendant was sentenced by a Court Martial to one year's confinement and a dishonorable discharge. The convening authority approved the sentence and ordered it into execution. The Board stated:

> "The action of the convening authority in this case purports to order the sentence into execution. Since the sentence extended to a dishonorable discharge, total forfeitures and confinement at hard labor for one year, it cannot be ordered into execution until appellate review has been completed. Therefore so much of the action as purports to order the sentence into execution is illegal, void and a nullity." *Id.* at 911.

In *United States* v. *Johnson,* 15 CMR 583 (1954), the Court stated:

> "So much of the action of the convening authority as purports to direct *execution* of the punishment of confinement and forfeitures is a nullity, since Article 71(c) of the Code forbids an order of execution as

> to any part of a sentence which includes confinement for one year or more until sentence has been affirmed by a board of review and the Court of Military Appeals." *Id.* at 584.

In *United States* v. *Emerson,* 20 CMR 434 (1955), the defendant was sentenced to one year's confinement. The convening authority reduced the sentence to eleven months and twenty-nine days and ordered it into execution. The Board stated:

> "It is evident that the reduction of the one year's confinement to eleven months and twenty-nine days was made in order to permit execution of the confinement portion of the sentence prior to completion of appellate review." *Id.* at 437.

On numerous other occasions, the military courts have recognized that execution of a sentence of one year or more prior to appellate review is prohibited by Article 71(c) UCMJ. E.g. *United States* v. *O'Malley,* 1 CMR 469 (1951); *United States* v. *Duggins,* 1 CMR 539 (1951); *United States* v. *Johnston,* 2 CMR 759 (1952); *United States* v. *Ansell,* 16 CMR 450 (1954); *United States* v. *Williams,* 16 CMR 717 (1954); *United States* v. *Mason,* 16 CMR 795 (1954); *United States* v. *Doyle,* 17 CMR 542 (1954); *United States* v. *Lock,* 36 CMR 72 (1965).[23]

The District Court below, in ruling that GCMO #13, purporting to order Captain Noyd into confinement in Fort

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[23] We have recited the unanimous military authority condemning the premature execution of a sentence to confinement in order to emphasize that the respondent convening authority clearly exceeded his statutory mandate when he purported to order Captain Noyd confined to Leavenworth pending appeal. Cf. *Oestereich* v. *Selective Service System,* 89 S. Ct. 414 (1968).

Leavenworth "pending appeal" violated Article 71(c) followed the holdings of the military courts when Judge Payne stated:

> "There is disagreement as to whether petitioner's incarceration at Fort Leavenworth would be for the sole purpose of safekeeping, or whether it would be considered execution of his sentence. It is the opinion of the Court that placing the petitioner in Fort Leavenworth would, in effect, constitute, in part at least, execution of the sentence. Petitioner's sentence includes a term of confinement for one year, and the Court holds that the respondents cannot execute such sentence until such review procedures as are mentioned in Article 71(c) are completed.
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> • • • • •
>
> It is the Court's ruling that ... the order confining petitioner to Fort Leavenworth constitutes execution of his sentence and is void ..." 285 F. Supp. at 787, 788.

C. *The Meaning of "Execution" Under Federal Law*

The interpretation given to Article 71(c) by the military courts and by Judge Payne below[24] is in accord with the meaning which the Federal Courts have consistently ascribed to the term "execution."[25] In each situation when

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[24] The Court of Appeals for the Tenth Circuit, below, in its citation of the *Smith*, *Ranes*, and *Lucero* decisions, apparently is in agreement with this unanimous reading of Article 71(c).

[25] The decision of the Fourth Circuit in *Levy* v. *Resor*, 384 F. 2d 689 (1967), granting the Government's motion under former Rule 25 of the Rules of the Fourth Circuit for permission to transfer Dr. Levy to Leavenworth did not address itself to Article 71(c) at all. In fact, no argument under Article 71(c) was made to the

the issue has arisen, Federal Courts have held that a sentence to confinement is "executed" upon the initiation of penal incarceration.

In *Sweet* v. *Taylor,* 178 F. Supp. 456 (D. Kans. 1959), Judge Huxman was faced with the problem of defining the meaning of "execute" in military law. He stated:

> "To execute means to carry out, to perform. It does not connote to impose or to modify." *Id.* at 460.

Thus, if imprisoning Captain Noyd at Leavenworth is the *de facto* equivalent of "carrying out" any portion of his sentence to confinement, it constitutes a premature "execution" of his sentence.[26]

In *United States* v. *Murray,* 275 U. S. 347 (1928), this Court ruled that a sentence to confinement is executed upon the initiation of penal incarceration. Mr. Chief Justice Taft held that even one day's penal incarceration constituted the "execution" of a sentence to confinement.

In *Affronti* v. *United States,* 350 U. S. 79 (1955), this Court expanded the *Murray* doctrine and ruled that penal incarceration pursuant to the first of two consecutive sentences "executed" the second sentence as well. Cf. *Peyton* v. *Rowe,* 391 U. S. 54 (1968).

Fourth Circuit by either party. A proceeding challenging the lawfulness of Dr. Levy's confinement to Fort Leavenworth was initiated in June, 1968 and is currently pending in the Tenth Circuit. *Levy* v. *Dillon,* #78-68 (10th Cir. argued Jan. 21, 1969).

[26] The transparency of the attempt to "carry out" Captain Noyd's sentence to confinement is emphasized by the Staff Judge Advocate's Review of his Court Martial which explicitly designates "U. S. Disciplinary Barracks, Fort Leavenworth, Kansas" as his "Place of Confinement."

D. *The Effect of ¶21d of the Manual for Courts-Martial*

It may be argued that the incarceration of Captain Noyd in the Disciplinary Barracks at Fort Leavenworth would not constitute an "execution" of his sentence, but merely a form of "necessary restraint" authorized by Paragraph 21d of the Manual for Courts-Martial. Such a subterfuge should not be permitted to succeed. Military authorities, no more than any other authorities, may not do by indirection what they have been explicitly barred from doing directly. Cf. *Speiser* v. *Randall*, 357 U. S. 513 (1958). They cannot execute Captain Noyd's sentence in the guise of applying "necessary restraint."

We do not contend that Article 71(c) prohibits all post-conviction military restraint pending appeal in every case.[27] We do assert, however, that it does prohibit incarceration at Fort Leavenworth pending appeal.

The United States Disciplinary Barracks at Fort Leavenworth is a maximum security military prison. *Manual for the Guidance of Prisoners: United States Disciplinary Barracks, Fort Leavenworth, Kansas* (1967 ed.) (hereinafter "*Manual*"). Persons confined to Fort Leavenworth are prisoners in the most literal sense of the word. At Leavenworth an officer-prisoner sleeps in a room with bars on his windows. *Manual*, Paras. 17; 54. He is unable to regulate his hours of meals or sleep. *Manual*, Para. 24. He is constantly under surveillance by armed guards. *Manual*, Paras. 10; 23. He is required to dress in prison garb. *Manual*, Para. 58. He is restricted to corresponding with five

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[27] See Point III, *infra* pp. 57-64 for a discussion of the scope and nature of post-conviction restraint available under the Uniform Code of Military Justice.

persons approved by the Prison Commandant. *Manual,* Para. 37. All his mail, incoming and outgoing, is censored. *Manual,* Para. 36. His reading matter is closely scrutinized and he is unable to subscribe to periodicals of his choice. *Manual,* Para. 38(d). He is permitted visitors only if they appear on his approved list of five correspondents. *Manual,* Para. 35. To argue that confinement to such an institution is merely "necessary restraint" rather than the execution of a prison sentence is, to say the least, an exercise in cynical semantics.

POINT III

The confinement of Captain Noyd at Cannon Air Force Base "pending appeal" violated the Uniform Code of Military Justice.

From his sentencing on March 9, 1968 until December 24, 1968, when he was ordered released by Mr. Justice Douglas, Captain Noyd was confined at Cannon Air Force Base. From March 9, to early June, he was confined to his own quarters and forbidden to leave them without permission. From June 6 to December 24, he was confined to a room at the Visiting Officer's Quarters. See App., p. 32. To the extent that Captain Noyd's confinement at Cannon Air Force Base was not reasonably required to insure his presence, and was, therefore, punitive, it constituted the premature execution of his sentence to confinement in violation of Article 71(c) and Article 13 of the Uniform Code of Military Justice and Paragraph 18b(3) of the Manual for Courts Martial.

It may be argued that confining Captain Noyd at Cannon Air Force Base was not punitive, but merely reflected the

"necessary restraint" authorized for post-conviction military prisoners by Paragraph 21d of the Manual for Courts Martial. However, a review of the applicable provisions of the Uniform Code of Military Justice, read in conjunction with the facts of this case, indicates that any form of physical confinement of Captain Noyd pending appeal would be unlawful.

Article 13 of the Uniform Code of Military Justice, 10 USC §813 provides:

> "No person, while being held for trial or the *result of trial,* may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, *nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances require to insure his presence . . .*" (emphasis added)

In *United States* v. *Teague,* 12 CMR 73 (1953) and *United States* v. *Petroff-Tachomakoff,* 19 CMR 121 (1955), the Court of Military Appeals has construed the phrase "held for . . . the result of trial" in Article 13 to include post-conviction military personnel who were awaiting the results of the military appellate process.[28] The Court held that paragraph 21d of the Manual for Courts Martial was the regulation which authorized commanders to impose "neces-

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[28] The Court of Military Appeals' reading of the phrase "result of such trial" as including persons awaiting the results of the appellate process is consistent with the use of the word "trial" elsewhere in the UCMJ. Article 44(b) UCMJ, dealing with double jeopardy, states:

> "No proceeding in which an accused has been found guilty by a court martial . . . is a trial in the sense of this article until the finding of guilty has become final after review of the case has been fully completed."

sary restraint" upon post-conviction military personnel pursuant to Article 13 UCMJ. Since Article 13 is the foundation for the authority under MCM ¶21d, it follows that any "arrest" or "confinement" imposed pursuant to paragraph 21d may not:

> "be any more rigorous than the circumstances require to insure [defendant's] presence." *Article 13, UCMJ.*

Therefore, if the confinement to which Captain Noyd has been subjected pending the completion of his appeals is more rigorous than would be reasonably required to secure his physical presence, such confinement is unauthorized and illegal, since it is punitive in nature.

In *United States* v. *Teague,* 12 CMR 73 (1953), the defendant had been convicted of being AWOL. He was placed under at-large arrest on the military base pending the completion of his appeals. The Court approved the imposition of this minimal post-conviction restraint, stating that given the defendant's past history of AWOL, it was reasonably necessary to secure his physical presence pending appeal. In *United States* v. *Petroff-Tachomakoff,* 19 CMR 121 (1955), the Court affirmed the imposition of "base restraint" upon a defendant awaiting appellate review of a court martial conviction. The Court found that the restraint was reasonably necessary to insure the defendant's physical presence. The Court specifically noted that the restraint imposed in *Petroff-Tachomakoff, supra,* was minimal.

In both of these cases, the Court's holding is based on the explicit assumption that if post-conviction restraint were not necessary to secure the defendant's presence, it would be totally unjustifiable and unlawful.

Paragraph 18b(3) of the Manual for Courts-Martial (1968 ed.)[29] restates the exact language of Article 13 of the Uniform Code of Military Justice, which prohibits the imposition of restraint upon an accused awaiting the results of his appeal "more rigorous than the circumstances require to insure his presence." Thus, under paragraph 18b(3) of the MCM, confinement may not be imposed pending appeal unless reasonably necessary to insure the physical presence of the accused. In addition, paragraph 18b(3) states:

> "Other than restraint administered as prescribed in this subparagraph (18b(3)) [restraint reasonably required to insure physical presence], ... no punishment may be imposed upon an accused as a result of trial by court-martial until the sentence has been approved and ordered executed."

It is respectfully submitted that it is absolutely impossible to square the confinement imposed upon Captain Noyd pending appeal with the mandatory provisions of the UCMJ and the MCM.[30] The confinement was nothing

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[29] The 1968 edition of the Manual for Courts-Martial superseded the 1951 edition, which contained the identical provisions.

[30] In *Levy* v. *Resor*, 37 CMR 399 (1967), the Court of Military Appeals held that a prisoner might, under certain circumstances, be confined to quarters pending appeal. However, in *Levy* confinement was defended by the military as necessary to insure Levy's physical presence. It was alleged, on remote hearsay, that Levy planned to flee the country if freed pending appeal. Unfortunately, no evidentiary hearing on these allegations was ever afforded Dr. Levy, who has vigorously denied them.

No one has ever intimated the slightest fear that Captain Noyd would not obey the mandate of an appellate tribunal. There simply never has been any reason for Captain Noyd's confinement, other than a desire to impose summary punishment.

less than an attempt to punish Captain Noyd prior to a decision on his appeal in express violation of Article 71(c) and Article 13 UCMJ and ¶18b(3) MCM.

Since the incarceration imposed upon Captain Noyd was neither "necessary" nor "required to insure his presence," it follows that such incarceration was punitive in nature. As such it clearly violated the strictures of military law prohibiting the execution of sentences of more than one year's confinement prior to the completion of the appellate process.

We do not contend that the military lacks the power to impose some form of post-conviction restraint pending appeal in the appropriate case. If it is reasonably necessary to insure the physical presence of a defendant, certainly restraints may be imposed. In fact, military law provides a sophisticated array of restraints which may be imposed upon a prisoner whose appeals are pending. A military commander may choose between placing a prisoner in a status of "arrest" or placing him in physical "confinement." Article 9(a) UCMJ; Para. 18a MCM. By placing a post-conviction prisoner in "arrest" a commander imposes moral restraints upon his freedom of action. Since the 1921 recodification of the Articles of War, the military has recognized "arrest" or "restriction" as a means of imposing restraint short of physical confinement. See, paragraph 139a MCM (1928 ed.); paragraph 19b & 19c MCM (1949 ed.); paragraph 20 MCM (1951 ed.); paragraph 20 MCM (1968 ed.). In a case such as the present one, if any restraints at all were necessary, the moral restraint of "restriction" was certainly sufficient. Anything more onerous, such as the physical confinement to which Captain

Noyd was subjected, is greater than is necessary to insure his physical presence and is, therefore, illegal.

We respectfully suggest, therefore, that the proper procedure in this case would have required respondents to do the following:

a) Make a determination after trial as to whether any restraints at all were necessary to insure Captain Noyd's presence at the completion of the appellate process.

b) If restraints were deemed necessary, to determine whether a form of "restriction" would be sufficient to insure Captain Noyd's presence.

c) Only if it were determined that "restriction" would not be sufficient to insure his presence, impose physical confinement upon Captain Noyd.

A fair reading of Articles 13 and 71(c) requires no less.

It may be argued that Article 57(b) requires that Captain Noyd be confined pending appeal because it provides that periods of confinement adjudged by a court martial are to run from the date of conviction. If Captain Noyd is released pending appeal, the argument continues, he will, in effect, serve his sentence while free of restraint because his sentence will continue to run. If there is, in fact, a conflict between Article 71(c) and Article 57(b), as Judge Payne observed, the conflict should be resolved in favor of the accused. However, no real conflict exists because this argument overlooks both the second portion of Article 57(b) which provides:

> "... but periods during which the sentence to confinement is suspended shall be excluded in computing the service of the term of confinement."

and the purpose of Section 57(b) as revealed by its legislative history.

It seems clear that to the extent to which Captain Noyd is free from physical confinement, his "sentence to confinement is suspended" and the running of his sentence is tolled. In *United States* v. *Bryant*, 30 CMR 133 (1961), the Court of Military Appeals held that the imposition of a new sentence by a second court martial suspended the running of a prior unexpired sentence. The Court stated:

> "... it is worthy of note that Congress did not mention all contingencies which would prevent an accused from being credited with time served." 30 CMR at 137.

One such contingency would certainly occur when a prisoner is released from confinement pending appeal.[31]

The legislative history of Article 57(b) indicates that it was intended to reverse the practice of confining certain prisoners pending appeal; but computing their sentences to run only from the date the convictions were affirmed on appeal. *Hearings before House Armed Services Committee* on H. R. 2498, 81st Cong., 1st Sess., pp. 1089-1090; House Report No. 491, 81st Cong., 1st Sess., p. 27. Thus, its purpose was not to compel all prisoners to be confined

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[31] *U. S.* v. *May*, 27 CMR 432 (1959) held that no probationary suspensions could be vacated without a hearing pursuant to Article 72. However, no reasonable person could contend that a stay of execution pending appeal, pursuant to Article 71(c), constitutes a probationary suspension. See, Cone, *The Death of the Technical Suspension*, JAG Journal (Nov.-Dec. 1959), p. 7.

pending appeal, but rather to insure that those prisoners whose activities make confinement necessary pending appeal receive credit for time served. *United States* v. *Bryant, supra,* 30 CMR at 138.

Thus, Article 57(b) provides no real obstacle to compliance with Articles 13 and 71(c).

POINT IV

The continued incarceration imposed upon Captain Noyd pending completion of the military appellate process deprived him of his liberty without due process of law since no tribunal—civilian or military—has accepted the responsibility of passing upon the merits of his defense.

Captain Noyd was convicted of willfully disobeying a direct order to train student pilots for duty in Vietnam. His principal defense was that his request for conscientious objector status or resignation from the Air Force had been wrongfully denied by the Secretary of the Air Force as a matter of law and that, therefore, the subsequent order with which he was confronted was unlawful. Cf. *United States* v. *Sigmon,* CM 416356, 1 SSLR 3054, 3055 (Army Board of Review, Jan. 2, 1968) (not yet officially reported).

However, by an unfortunate interaction between (1) the decision of the court below in *Noyd* v. *McNamara, supra;* (2) a violation of Article 71(c) of the Uniform Code of Military Justice; and (3) the decision of the court below in *Noyd* v. *Bond, supra,* petitioner served more than nine months in confinement, and he is yet to receive a hearing on the merits of his principal defense. The imposition of

penal incarceration *prior* to permitting any hearing on Captain Noyd's defense violated the most basic notions of due process of law.

Absolutely fundamental to a rational view of due process of law is the concept that no person may be compelled to serve a sentence to confinement prior to a hearing on his defense.[32]

A brief summary of Captain Noyd's strange and frustrating odyssey through the courts demonstrates that although he has served more than nine months of his one year sentence to confinement, no tribunal, civilian or military, has ruled on the merits of his principal defense.

Initially, Captain Noyd approached the United States District Court in Denver, Colorado, in March, 1967, when he was an Assistant Professor of Psychology at the Air Force Academy. Captain Noyd contended that his application for conscientious objector status had been unlawfully rejected by the Air Force and that he was in imminent danger of receiving an order which would conflict with his religious beliefs. Judge Doyle initially granted a preliminary injunction, staying the Air Force from placing Captain Noyd in a position where he would be forced by his religious beliefs to disobey an order. *Noyd* v. *McNamara,* —— F. Supp. —— (March 29, 1967). See Appendix, p. 48.

However, several weeks later, Judge Doyle dissolved the injunction, ruling that he lacked jurisdiction to con-

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[32] Lewis Carroll in "The Trial of the Knave of Hearts" has captured the bizarre quality of Captain Noyd's dilemma. The Red Queen insists that the proper procedure is "sentence first, verdict later." Unfortunately, that is precisely what has happened to Captain Noyd.

sider the merits of Captain Noyd's request for equitable relief. Judge Doyle held that Captain Noyd must present his claims to a court martial prior to seeking the assistance of the Federal Courts. Judge Doyle's decision was affirmed by the Tenth Circuit, which held that Captain Noyd:

> "has not exhausted the military process and has not been denied, nor can we anticipate that he will be denied, a full consideration of his constitutional rights within the complete scope of that process." 378 F. 2d 538, 539-540 (10th Cir. 1967).

This Court denied certiorari. 389 U. S. 1022 (1967). In his Memorandum in Opposition to the petition for certiorari in *Noyd* v. *McNamara*, the Solicitor General of the United States argued:

> "... if and when petitioner is actually confronted with an order and charged with disobedience of it, he will have the opportunity to present his defenses within the traditional framework of court-martial procedures, review boards, resort to the Service Secretary, and request for relief from the Court of Military Appeals." *Memorandum for the United States in Opposition*, p. 4.

Although petitioner contended that the federal courts would have been the appropriate forum to determine the lawfulness of the denial of his claim for conscientious objector status, prior to any court martial, cf. *Hammond* v. *Lenfest*, 398 F. 2d 705 (2d Cir. 1968), he accepted the refusal of the courts to acknowledge jurisdiction and prepared to present his defenses to a court martial, if necessary.

Shortly thereafter, Captain Noyd was indeed confronted with an order which conflicted with his religious beliefs and, as was predictable, he found himself before a General Court Martial at Cannon Air Force Base, Clovis, New Mexico.

In keeping with the rulings of Judge Doyle and the 10th Circuit and the authoritative statement of the Solicitor General, Captain Noyd strenuously attempted to raise his defense at his court martial. But the Law Officer ruled that, notwithstanding the assurances of the 10th Circuit and the Solicitor General, a military court martial lacked the power to determine whether Captain Noyd's application for conscientious objector status had been unlawfully denied. See *U. S.* v. *Noyd,* Record of Trial, p. 327.

The decision of the court martial was affirmed by an Air Force Board of Review which also disclaimed the power to determine Captain Noyd's defense. In its decision the Air Force Board of Review stated:

> "Our decision in ACM 20016, Dunn, —— CMR ——, decided 1 May, 1968, answers the contention that the Secretary of the Air Force made an error of law in denying the accused's applications under AFR 35-24 for classification as a conscientious objector. In *Dunn,* the defense likewise demanded a judicial review within the court martial system of a Secretarial determination that the accused was not entitled to an administrative discharge as a conscientious objector. We held:
>
> > 'The obvious answer is that such judicial review was not within the jurisdiction of the court-martial which tried the accused. The jurisdiction of a court-martial is a very limited jurisdiction derived from

the power of the Congress, in Article I, Section 8, Clause 14, of the Constitution "To Make Rules for the Government and Regulation of the land and naval Forces."' [Citation omitted.]

"... it is the Federal, not the military, courts which have jurisdiction in a proper case to review proceedings under such military regulations to determine whether there has been substantive due process." [Citations omitted.] *U. S.* v. *Noyd.* See App., pp. 40-41.

The Air Force officers comprising the Board of Review —as well as the Air Force Law Officer on the general court-martial—concluded that they lacked jurisdiction to rule on Captain Noyd's defense. But other Air Force officers, the respondents herein, lost no time in confining him in spite of Article 71(c) of the UCMJ.

After Captain Noyd had successfully protested to the District Court for the District of New Mexico that his imprisonment at Leavenworth pending appeal was unlawful, the Tenth Circuit reversed, holding, once again, that Captain Noyd had not exhausted his military remedies. *Noyd* v. *Bond,* 402 F. 2d 441 (1968). Thus, the court below ruled that although it had, apparently mistakenly, remitted Captain Noyd to a defense procedure that did not exist, it would refuse to permit a federal court to save him from serving his sentence prior to being afforded any opportunity to secure a hearing on the merits of his defense.

While the Tenth Circuit and the Air Force Board of Review have mutually and respectfully deferred to one another "as nimbly as if dancing a quadrille," *Orloff* v.

Willoughby, 345 U. S. 83, 87 (1953), Captain Noyd has served more than nine months in confinement at Cannon Air Force Base (but for Judge Payne it would have been at Fort Leavenworth) before any court accepted the responsibility of telling him whether his underlying claim of conscience was valid.

The responsibility of the Federal judiciary to prevent the occurrence of the bizarre procedural dilemma into which Captain Noyd has been thrust is manifest. There can be no more classic use of the writ of *habeas corpus* than the prevention of "sentence first, verdict later."

POINT V

This case is not moot.

Captain Noyd was sentenced to one year's confinement on March 9, 1968. His "minimum release date," assuming maximum time credited for good behavior, was December 26, 1968. On December 24, 1968, Mr. Justice Douglas ordered Captain Noyd released from confinement, pending this Court's determination of his petition for a writ of certiorari, in order to prevent the appeal herein from becoming moot. 89 S. Ct. 478. On January 20, 1969, this Court granted Captain Noyd's petition for a writ of certiorari and continued Mr. Justice Douglas' order pending argument on the merits. 89 S. Ct. 692.[33]

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[33] In granting the petition for a writ of certiorari, this Court stated: "The petition for a writ of certiorari is granted and the case is placed on the summary calendar. The stay heretofore granted by Mr. Justice Douglas shall remain in effect pending the issuance of the judgment of this Court or until further order of this Court." See App., p. 29.

The Government, in its two memoranda submitted in opposition to the grant of certiorari, has suggested that, notwithstanding the action of Mr. Justice Douglas in ordering Captain Noyd released on December 24, 1968, and notwithstanding the action of the entire Court on January 20, 1969, in granting certiorari and continuing Mr. Justice Douglas' stay, the appeal herein is moot.

The Government contends that Captain Noyd's sentence continued to run despite the actions of this Court and, therefore, was fully served on December 26, 1968. The Government's mootness argument is premised upon Article 57(b) of the Uniform Code of Military Justice, 10 USC §857(b), providing that sentences adjudged by a court martial shall run continuously from the date of conviction.[34] Accordingly, so the Government argues, Captain Noyd's sentence continued to run after December 24, 1968, despite the efforts of this Court to toll it. Petitioner respectfully maintains that the suggestion of mootness is erroneous.

First, regardless of any contrary provision of military law, this Court possesses inherent power to preserve the *status quo* in order to protect its jurisdictional integrity. See *United States* v. *United Mine Workers of America*, 330 U. S. 258 (1947). Mr. Justice Douglas and ultimately the full Court sought, by ordering Captain Noyd released from confinement, to preserve the *status quo* as of December 24, 1968, in order to prevent this appeal from becoming moot. This Court's mandate may not be evaded by simply pretending that it has no effect, cf. *Cooper* v. *Aaron*, 358 U. S. 1 (1958). Certainly, the military estab-

[34] See discussion of the tolling problem, *supra*, pp. 62-64.

lishment cannot shield its actions from judicial scrutiny by asserting that sentences imposed by it may not be tolled, even by this Court in aid of its jurisdiction. See *Thompson* v. *Louisville,* 362 U. S. 199, 202, n. 5 (1960); *In re Bart,* 82 Sup. Ct. 675, 676 (1962).

Second, even apart from the inherent power of this Court to maintain the *status quo* in aid of its jurisdiction, the action of Mr. Justice Douglas, and ultimately the full Court, in ordering Captain Noyd released effected a tolling of his sentence under military law.

In *United States* v. *Bryant,* 30 CMR 133 (1961), the Court of Military Appeals ruled that Article 57(b) could not be mechanically applied to effect absurd results. The Court ruled that Congress had not exhaustively enumerated all of the contingencies which would toll the running of a sentence. Clearly, one such contingency must occur when an accused is temporarily ordered released by a court.

The Manual for Courts Martial recognizes that a prisoner does not earn credit for time served when he is free from confinement. ¶97c MCM. In fact, the third subparagraph of Paragraph 97c provides:

> "Periods during which the person undergoing such a sentence ... is erroneously released from confinement upon his petition for a writ of habeas corpus under a court order which is later reversed by a competent tribunal, shall be excluded in computing the service of the time of punishment."

In addition to release on *habeas corpus,* paragraph 97c provides that no credit for time served may accrue while

a prisoner is free after an escape or has secured his freedom through misrepresentation or fraud. Thus, it is plain that the rationale of 97c is that a military prisoner who has been freed from confinement may not receive credit for time served during the period of his release.[35]

Finally, the Government has contended that the incarceration to which Captain Noyd was subjected at Cannon Air Force Base did not actually constitute "confinement" and was, therefore, not tolled by Mr. Justice Douglas' order. The Government contends that Captain Noyd was subjected merely to a form of "arrest in quarters" rather than "confinement" and that, while it may be possible to toll a sentence to "confinement", it is impossible to toll a sentence to "arrest in quarters."

By any objective standard of measurement, Captain Noyd was subjected to a drastic deprivation of his personal liberty. He was ordered removed from his family quarters where he resided with his wife and two children and incarcerated in a room in bachelor officer's quarters; he was permitted to leave the room only for meals, and other specfied events such as chapel and a weekly 1½ hour exercise period; he was permitted to see his wife and children only twice a week; his visitors were rigidly controlled; he was not permitted to associate with any military personnel, even during his bi-weekly visiting period; he was required to notify base "Security Police Operations" whenever he left the room for any of the specified reasons; and he was subject to surveillance by armed security police. Merely labeling Captain Noyd's incar-

[35] The examples of "inoperative time" contained in ¶97c are explicitly non-exhaustive. They are merely examples which are designed to illustrate a general principle.

ceration as "arrest in quarters" cannot obscure the objective reality of his confinement.

In fact, the military authorities have consistently viewed Captain Noyd's status as that of "confinement." It is conceded by the Government that Captain Noyd is entitled to the maximum "good time" abatement from his adjudged sentence. It is only by taking such an abatement into consideration that the December 26, 1968, release date has been computed. However, pursuant to a joint Army-Air Force regulation, "good time abatement" is available only to prisoners serving sentences to confinement. AR 633-30; AFR 125-30. Therefore, by the admission of the military itself, the contention of the Government that Captian Noyd's incarceration was not "confinement" is untenable.

Even if Mr. Justice Douglas' order had not tolled the running of Captain Noyd's sentence, the appeal herein would not have become moot. *Carafas* v. *LaVallee,* 391 U. S. 234 (1968); *Peyton* v. *Rowe,* 391 U. S. 54 (1968); *Carroll* v. *President and Commissioners of Princess Anne,* 89 S. Ct. 347 (1968).

In *Bus Employees* v. *Missouri,* 374 U. S. 74 (1963), this Court refused to dismiss an appeal as moot when the underlying dispute which had precipitated the appeal remained unresolved, creating the possibility that the allegedly moot governmental action might be renewed in the future. See also, *South Pacific Terminal Co.* v. *I. C. C.,* 219 U. S. 498 (1911); *Carroll* v. *President and Commissioners of Princess Anne,* 89 S. Ct. 347 (1968).

Captain Noyd has been restored to duty pending the outcome of his military appeals. If this Court determines

that this appeal is moot, Captain Noyd would, once again, be subject to the very same cycle of order-refusal-court martial-illegal confinement which brought him to his present plight.[36] Captain Noyd's religious scruples remain unchanged. The refusal of the Air Force to grant him conscientious objector status remains unchanged. Just as in *Bus Employees, supra,* the underlying conflict remains unresolved. If he is ordered to perform duties in violation of his conscientious beliefs, he may once again face a General Court Martial. To argue that Captain Noyd lacks a "substantial stake", *Fiswick* v. *United States,* 329 U. S. 211, 222 (1946), in establishing that he may not be incarcerated until he has had an opportunity to appeal is to ignore the reality of his present status.

The vulnerability of Captain Noyd to a repetition of the illegal confinement to which he has already been subjected reinforces the wisdom of the "continuous circumstances" doctrine enunciated by this Court in *Bus Employees, supra,* and *Carroll, supra,* which permits review of governmental action of short duration which may be repeated in the future, without regard to technical notions of mootness.

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[36] Any contention that the passage of the Military Justice Act of 1968 has solved the problem of confinement pending appeal in the military is incorrect. The amendment to Article 57 UCMJ (10 U. S. C. §857), providing that prisoners may, in the absolute discretion of the convening authority, be released pending appeal, does no more than codify the already existing power of a commanding officer to release a military prisoner pending appeal. See *Levy* v. *Resor,* 37 CMR 399 (1967), ¶21d MCM. There is no attempt to define the nature and extent of the restraint, if any, which may be imposed pending appeal if a convening authority chooses not to utilize the new 57d. Thus, the asserted power to impose incarceration pending appeal is not diminished by 57d.

In any event, the statute is of no application at all to petitioner, to the large number of military prisoners presently in confinement pending appeal, and to any other servicemen who may receive a court-martial sentence of one year or more between now and the effective implementation of the new statute.

CONCLUSION

The judgment of the Court of Appeals should be reversed. So much of the judgment of the District Court as barred respondents from confining petitioner at the United States Disciplinary Barracks at Fort Leavenworth, Kansas should be reinstated. So much of the judgment of the District Court as permitted respondents to incarcerate petitioner at Cannon Air Force Base, New Mexico should be reversed.

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* Attorneys for petitioner express their appreciation for the valuable research assistance of Mr. Roger Dunwell, third-year student at New York University School of Law.

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 830

CAPTAIN DALE E. NOYD, PETITIONER

v.

MAJOR GENERAL CHARLES R. BOND, JR., COMMANDER, TWELFTH AIR FORCE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (A. 22–26) is reported at 402 F. 2d 441. The opinion of the district court (A. 16–21) is reported at 285 F. Supp. 785.

JURISDICTION

The judgment of the court of appeals was entered on October 30, 1968. A petition for a writ of certiorari was filed on December 13, 1968, and was granted on January 20, 1969 (A. 29). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's present habeas corpus action, contending that post-conviction restraint constituted unlawful "execution" of his sentence to confinement prior to completion of military review of his court-martial conviction, has been rendered moot by the expiration of the sentence to confinement.

2. Whether the court of appeals correctly determined, in light of petitioner's failure to exhaust his available remedies within the military review system, that the district court should not have entertained his challenge to the restraint imposed upon him.

3. Whether restraint of petitioner pending completion of military review of his court-martial conviction constituted "execution" of his sentence in violation of the Uniform Code of Military Justice, or was otherwise unlawful.

STATUTES AND REGULATIONS INVOLVED

The pertinent portions of the Uniform Code of Military Justice (Arts. 9, 10, 13, 57, and 71, 10 U.S.C. 809, 810, 813, 857, and 871); the Manual for Courts-Martial, United States, 1951 (paras. 18, 20, 21, and 97); Air Force Manual 125–2 (paras. 6–8 and 6–16); and Air Force Regulation 125–30 (paras. 4 and 5) are set forth in the Appendix, *infra*, pp. 61–70.

STATEMENT

1. After completing an Air Force ROTC program as a distinguished military graduate in 1955, peti-

tioner accepted a commission as a regular officer in the Air Force and has served on active duty since that time. In return for Air Force financing of his graduate study for master's and doctoral degrees, he agreed to serve until June 1969. In 1966, while teaching at the Air Force Academy, he developed a belief that the conflict in Vietnam is immoral, and he sought, unsuccessfully, to be separated from the service or reassigned as a conscientious objector.[1]

Following his transfer to Cannon Air Force Base, New Mexico, petitioner was ordered by his superior officer to fly as an instructor with a student pilot, but he refused to do so (A. 37–38). On March 8, 1968, he was convicted by a general court-martial of willful disobedience of a lawful order (A. 4), and on March 9, 1968, he was sentenced to one year's confinement at hard labor, forfeiture of all pay and allowances, and dismissal from the Air Force. The convening authority approved the sentence on May 10, 1968, and directed that, "[p]ending completion of appellate review, the accused will be confined in the United States Disciplinary Barracks at Fort Leavenworth, Kansas" (A. 31). On September 3, 1968, the Air Force Board of Review affirmed the conviction (A. 35–47). A petition for review was granted by the United States Court of Military Appeals on Janu-

[1] Petitioner's challenge to the Air Force's denial of his applications, and his request for an injunction against assigning him to duties in connection with the conflict in Vietnam, were denied. *Noyd* v. *McNamara*, 267 F. Supp. 701 (D. Colo.), affirmed, 378 F. 2d 538 (C.A. 10), certiorari denied, 389 U.S. 1022.

ary 23, 1969, and the merits of the court-martial conviction are presently pending before that court.[2]

2. Petitioner makes no challenge in this proceeding to the validity of his conviction (see Pet. Brief pp. 22–23, 27–28). The present case involves only a dispute about the nature of the restraint which the military imposed on petitioner pending final military review of his conviction.

Following the order of the convening authority designating Fort Leavenworth as the place of confinement pending appellate review, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the District of New Mexico (A. 3–15), challenging his proposed transfer to the Leavenworth Barracks and seeking to be released from the restraint of arrest in quarters, which had been ordered immediately following his conviction. The district judge held that a transfer to the Barracks at Fort Leavenworth "would, in effect, amount to execution of the sentence" (A. 19) prior to completion of appellate review, in violation of Article 71(c) of the Uniform Code of Military Justice, 10

[2] The issues on which review was granted are (1) whether the lower military tribunals properly held that it would not be a defense to a charge of wilfully disobeying orders to show that the Secretary of the Air Force had erroneously denied petitioner's application for separation from the service or reassignment on grounds of conscientious objection to the conflict in Vietnam, and (2) whether, if such a showing would have made out a defense, the Secretary of the Air Force had properly ruled that petitioner was disqualified from conscientious objector status because he has no conscientious objection to participation in war in general but only to the particular hostilities in Vietnam.

U.S.C. 871(c), and issued a judgment relieving petitioner from the transfer order. The court refused, however, to order petitioner's release from arrest in quarters, ruling that this was a matter for the exercise of discretion by the appropriate military authorities (A. 16–21). Thereafter, the Air Force rescinded the transfer order and directed that petitioner be placed under arrest in quarters in a room in the Visiting Officers Quarters at Cannon Air Force Base, under restrictions permitting him to leave the room, without escort, for certain routine activities (A. 32–34).

Cross-appeals were then taken from the unfavorable portions of the district court's order. The court of appeals held (A. 22–26) that the district court should not have entertained the action, since petitioner had not exhausted his available military remedies—*inter alia,* by challenging the restraint before a Board of Review, or filing a petition for habeas corpus in the United States Court of Military Appeals, pursuant to that court's recent decision in *Levy* v. *Resor,* 17 U.S.C.M.A. 135, 37 C.M.R. 399. The court of appeals accordingly reversed the district court's judgment granting partial relief to petitioner. This Court then granted certiorari to review that decision (A. 29).

SUMMARY OF ARGUMENT

I

This case may have become moot by operation of law. Petitioner's principal contention in applying for relief in the civilian courts was that his proposed

transfer to Fort Leavenworth would have constituted "execution" of his sentence to confinement at hard labor, forbidden by Article 71(c) of the Uniform Code of Military Justice until completion of appellate review of the underlying conviction. But it is doubtful whether there remains any live controversy between the parties on this question since petitioner's sentence to confinement at hard labor has now expired by operation of law, thus relieving him of any risk of premature "execution" of that sentence.

Article 57(b) of the Code directs that "any period of confinement included in a sentence of a court-martial begins to run from the date the sentence is adjudged * * *." As consistently interpreted by the courts and as implemented by military regulations, this Article means what it says: that a sentence to confinement begins to run from the date it is pronounced, irrespective of whether the accused is placed in confinement or is subjected to no restraint whatsoever. Petitioner so acknowledged in the district court.

Under the Code and the regulations, the sentence then runs continuously unless "suspended" or interrupted by culpable absence from confinement. As used in the Code, "suspension" of sentence refers only to the determination of a reviewing authority to place the accused in a formal probationary status, and the "suspension" can be revoked only for cause after a hearing. The decision in this case not to confine petitioner thus cannot be equated with suspension of his sentence for these purposes.

While the Manual for Courts-Martial and the regulations contemplate other situations in which the running of a sentence to confinement will be considered interrupted, these exceptions to the general rule prescribed by Congress purport to apply only when the accused secures his release from confinement by some misconduct or culpable error, like escape or fraud. This case presents no factors of this type which would sustain a conclusion that petitioner *should not* receive the credit generally required by Article 57(b).

At no time have we argued that the Court, or a Justice, or other federal judge is without authority to preserve judicial jurisdiction by tolling the running of a military sentence in order to avoid mootness. But respondents are uncertain whether such power was exercised in this case. The order entered by Mr. Justice Douglas two days before petitioner's sentence was to expire made no reference to the mootness problem; it dealt only with insuring petitioner's non-incarceration and his freedom from duties which might conflict with his conscience. The order, in form and substance, appeared to intend no more than to release petitioner on personal recognizance. In the absence of any express indication that respondents were authorized to treat petitioner's sentence as an exception to the general rule established by the Congress and Executive regulations, there may be no alternative to concluding that by force of law petitioner's sentence continued to run until it expired shortly thereafter. We emphasize, however, that the mootness of this case—which involves a collateral inquiry into whether certain re-

straint was unauthorized "execution" of a sentence now expired—would not affect petitioner's separate proceedings in the Court of Military Appeals to review his conviction. But when the underlying basis for *this* lawsuit ended, so in practical terms did the "case" or "controversy" between the parties.

II

The court of appeals properly held that the district court should have declined to entertain petitioner's action because he had failed to exhaust his military remedies. The exhaustion of remedies doctrine, which this Court in *Gusik* v. *Schilder,* 340 U.S. 128, held applicable to federal habeas corpus review of military courts-martial convictions, is equally appropriate where, as in this case, petitioner challenges only the type of restraint imposed upon him pending review of his conviction. Application of the exhaustion doctrine in the circumstances of this case not only serves to avoid unnecessary litigation in the federal courts to correct an alleged error which can be corrected by a military tribunal, but it also ensures that prior to disposition by civilian judges, who are unfamiliar with military discipline and the system of military justice, claims raising difficult and important problems of military law have been given the fullest opportunity for consideration and analysis by the tribunals which have been established exclusively to deal with them. Petitioner's opportunity in this case to test the legality of the type of restraint in a habeas corpus action in the Court of Military Justice was a prompt

and fully effective remedy. His failure to pursue that remedy before seeking federal habeas corpus relief justified the dismissal of the application.

III

If the Court decides to reach the underlying questions involved in the case, affirmance is nevertheless in order. The Code and the Manual for Courts-Martial contain clear authority for the order that would have transferred petitioner to Fort Leavenworth pending appellate review of his conviction.

The prohibition in Article 71(c) against "execution" of certain sentences to confinement prior to final appellate approval relates only to "carrying out" such sentences. But contemporaneous administrative construction, in the form of the Manual promulgated by the President and the regulations issued by the Service Secretaries, supported by judicial approval, demonstrates that this provision does not forbid all post-conviction restraint, including confinement, before the sentence may be "executed." Rather, military authorities are authorized to take appropriate steps to provide for the temporary custody of the accused during the interim, and this temporary custody may extend to a transfer to a United States Disciplinary Barracks. The critical circumstance underscoring the conclusion that such a transfer is not "execution" of a sentence to confinement at hard labor is that military regulations expressly direct that a person in confinement pending review may not be required to perform hard labor. In addition, while at Leavenworth pend-

ing review, petitioner would have retained his rank with the privileges and respect attendant to it.

Insofar as petitioner seeks to protest the propriety of the determination as to which form of restraint to impose, a long line of cases in this Court establishes that the civilian courts on habeas corpus are without jurisdiction to review an exercise of discretion in choosing among authorized alternatives as part of the court-martial process. Petitioner has at various times in this litigation conceded the key proposition that *some* post-conviction restraint is permissible, and thus there would appear to be nothing left to litigate in this proceeding. His concession is well founded, for the Code evidently contemplates such restraint, reasonable military regulations sanction it, and the Court of Military Appeals and the Court of Appeals for the Fourth Circuit have sustained it. Nothing in the Code requires that the sole criterion for post-conviction restraint be probable cause to believe the accused might flee. That standard would be narrower than that constitutionally applied after conviction in the civilian courts, and there is no basis for concluding that Congress intended to reduce the authority of military commanders to impose post-conviction restraints deemed appropriate under all the circumstances.

While this Court's decisions hold that the wisdom of a choice made within the court-martial process is not collaterally reviewable, we point out in any event that there is evidently ample justification for the imposition of restraint in this case. Petitioner's superiors were entitled to consider the nature of the offense,

the motive for it, petitioner's status as an officer, the location of the air base, and the effect of unrestrained movement on the efficiency and morale of the unit.

ARGUMENT

I

THE CASE MAY BE MOOT

Shortly before certiorari was granted, we filed a memorandum suggesting mootness. Although the Court did not direct that the issue be briefed, we, like petitioner (Brief pp. 69–74), believe that full discussion of the question at this stage is in order. While the Court may well conclude that our Suggestion of Mootness turned on an unduly technical interpretation of the release order issued by Mr. Justice Douglas, the following discussion is submitted to set forth, as part of the adversary process, the relevant factors relating to the existence and exercise of this Court's appellate jurisdiction under Article III of the Constitution.

1. Petitioner's sentence, including the term of confinement, was adjudged on March 9, 1968 (A. 31). Prior to filing his petition for a writ of certiorari in December 1968, petitioner applied to the Circuit Justice for release pending the disposition of the proposed petition. He indicated that the relief requested was necessary to prevent his challenge to restraint pending military review from becoming moot, in view of the fact that his one-year sentence, taking into account the time credited for good behavior, was due to expire on December 26, 1968. The government, re-

sponding to the application, acknowledged that, by virtue of the provisions of Article 57(b) of the Uniform Code of Military Justice, 10 U.S.C. 857(b), petitioner's sentence to confinement would indeed expire on December 26, 1968, thus rendering this action moot. We nonetheless opposed the granting of relief on the dual grounds that, under established law as settled by the Court of Military Appeals and the Fourth Circuit,[3] petitioner was not entitled to be released from arrest in quarters pending appellate review, and that, in any event, the underlying issue sought to be posed had little significance for the future in light of the intervening passage of amendments to the Uniform Code of Military Justice (effective August 1, 1969) providing for a procedure similar to bail for persons awaiting review of their court-martial convictions.

On December 18, 1968, the Circuit Justice denied the application. On December 24, 1968, Mr. Justice Douglas, to whom the application had then been referred, entered an order providing that, until the full Court had an opportunity to pass on the petition, "petitioner should be placed in a non-incarcerated status, which as the District Court said, should prevent his superiors from 'assigning the plaintiff to combat activity or requiring him to perform duties whereby he will be perhaps faced with the necessity of a General Court Martial or other proceedings that might injure

[3] *Levy* v. *Resor*, 17 U.S.C.M.A. 135, 37 C.M.R. 399; *Levy* v. *Resor*, 384 F. 2d 689 (C.A. 4), certiorari denied, 389 U.S. 1049.

him as a practical matter'" (A. 28).[4] The Court, in granting certiorari on January 20, 1969, continued the stay granted by Mr. Justice Douglas.

2. The contention decided in petitioner's favor in the district court, which the court of appeals then held should not have been entertained, was his assertion that the proposed transfer to Fort Leavenworth would constitute unlawful premature "execution" of his sentence to confinement. Thus, the linchpin of this issue is what constitutes "execution" of a sentence as that term is used in the Uniform Code of Military Justice. It would seem to follow that once the sentence to confinement has expired, the question of what forms of restraint may be considered "execution" of the sentence becomes academic. The possibility that the present case may have become moot, in the sense that the basis for the underlying dispute has disappeared, arises from Congress's provision in military law for a unique principle for computing the commencement

[4] The language quoted by Mr. Justice Douglas appeared in a temporary restraining order, later vacated for want of jurisdiction, issued by a district judge in petitioner's *prior* action seeking review of the Air Force's refusal to release or reassign him as a conscientious objector (A. 48–50). In the present context, petitioner would not have been assigned to duties inconsistent with his claimed conscientious objection even had Mr. Justice Douglas not so ordered. Under military law, a person in arrest status, as petitioner was at the time of the release order, cannot be assigned military duties involving command or the bearing of arms. Manual For Courts-Martial, United States, 1951 [hereinafter Manual], para. 20a. Furthermore, under Air Force regulations, an officer sentenced to dismissal by court-martial is automatically disqualified from flying status. Air Force Manual 35–13, para. 2–29(h).

and duration of a court-martial sentence to confinement.

Article 57(b) of the Uniform Code of Military Justice (10 U.S.C. 857(b)), provides:

> Any period of confinement included in a sentence of court-martial begins to run from the date the sentence is adjudged by the court-martial, but periods during which the sentence to confinement is suspended shall be excluded in computing the service of the term of confinement.

This statute has consistently been interpreted as requiring "that an accused receive credit against a sentence to confinement for time served from the date the court-martial adjudged sentence instead of some later date when punishment was approved by reviewing authority." *United States* v. *Bryant,* 12 U.S.C. M.A. 133, 138. Indeed, in a case in which the convening authority reduced a sentence of a bad conduct discharge to confinement for four months, the Court of Military Appeals ruled that by operation of law under Article 57(b) the new confinement term had to be deemed to have begun to run on the date the accused had been *sentenced* by the court-martial to a punitive discharge. *United States* v. *Brown,* 13 U.S.C. M.A. 333, 32 C.M.R. 333.

Military courts and the military authorities have thus understood Article 57(b) as commanding the general rule that an accused be considered "serving" a sentence to confinement irrespective of whether he is, or can be, ordered to execute the confinement por-

tion of his sentence or whether he is subject to any restraint; credit accrues even where he is assigned to normal duties pending review. Indeed, respondents are governed by interpretive regulations jointly promulgated by the Secretaries of the Army and the Air Force which direct: [5]

> 4. OPERATION OF SENTENCES. *a. Beginning date.* The date the sentence of a court-martial is adjudged will mark the beginning of a sentence to confinement *whether or not the accused had then been placed in confinement* [emphasis added].

Thus, correctly understanding the computation of a military sentence under the code, petitioner's counsel stated to the district court at the hearing on the habeas corpus application: "Captain Noyd's one-year sentence began to be served on March the 9th" (Tr. 25), the date it was adjudged.

This is, of course, contrary to the rule which prevails with respect to criminal sentences in the federal courts, see 18 U.S.C. 3568.[6] It is this less-lenient rule that petitioner argues (Pet. Br. pp. 62–64, 71–72) should here be adopted, so that periods not spent in confinement will not count toward the service of a military sentence and that release from any restraint will automatically operate to toll the running of a

[5] Apprehension and Confinement: Military Sentences to Confinement, AR 633–30; AFR 125–30.

[6] Congress has expressly provided in this section that the traditional federal rule does *not* apply to sentences for offenses tried by court-martial.

sentence under Article 57(b).[7] But the legislative history cited by petitioner precludes such an interpretation, requiring instead the interpretation given to it by the military authorities. Thus, it was specifically explained that:

> Subdivision (b) requires a sentence of confinement to begin to run on the date that it is adjudged even though the accused is not actually in confinement, unless the sentence is suspended.

[7] This contention can only be termed remarkable, since its acceptance would mean that petitioner would be liable to serve not just the two days the Air Force considered unexpired when the release order was entered, but the entire one-year prison sentence. This is so because petitioner has *never* been in "confinement" as that term is defined in the Code and the Manual. Rather, as he averred in the district court (A. 4; Tr. 14, 16), he has been subject to the lesser restraint of "arrest in quarters", the status that continued until the entry of Mr. Justice Douglas' order (see A. 32–34). As used and understood in military law, the concept of "arrest" differs critically from "confinement" in that arrest is simply the *moral* restraint flowing from a serviceman's duty to obey an order restricting his conduct, while confinement is the *physical* deprivation of his freedom. See Code Art. 9(a), 10 U.S.C. 809(a); Manual, paras. 18, 20. Petitioner has at no time been in "confinement."

He is also in error in contending that the absence of confinement precluded his accumulation of good-conduct abatement of part of his sentence. The Judge Advocate General of the Air Force ruled that under "Department of Defense Instruction No. 1325.4 on Uniform Policies and Procedures Affecting Military Prisoners and Places of Confinement", AF Manual 125-2 (Attachment 2, pp. 16–17), persons in a status like petitioner's should be considered accruing good time credit. This advice did nothing more than confirm what petitioner already knew, since his counsel, during the hearing on his habeas corpus application barely two months after the conviction, advised the court that good time credit was being accumulated (Tr. 25). It was on that understanding that petitioner raised the mootness possibility before this Court.

Hearings on H.R. 2498 Before a Subcommittee of the House Armed Services Committee, 81st Cong., 1st Sess., pp. 1089–1090; H. Rep. No. 491, 81st Cong., 1st Sess., p. 27.

Nor can these express disclaimers be deprived of meaning by giving the exception for a "suspended sentence" the expanded scope petitioner suggests (Br. p. 59). A suspended sentence in military law, as in civil, refers to a determination placing a defendant on probation—a status which may be revoked only for cause after a formal hearing. Code Arts. 71, 72, 74, 10 U.S.C. 871, 872, 874; Manual, paras. 88e, 97a, 97b; *United States* v. *May*, 10 U.S.C.M.A. 358. Release from some form of restraint pending completion of military review no more constitutes "suspension" of the sentence as the term is used in the Code than does the decision not to impose any restraint during that period. Hence, the stay granted in this case, whatever its effect, did not serve to "suspend" petitioner's sentence.[8]

3. At first blush, allowing credit on a military sentence from the date the sentence is adjudged may seem overly generous in the situation where the convicted accused is not placed in any "confinement" (or even arrest) pending appeal. Apart from the fact

[8] The Uniform Code expressly provides only one other way in which a sentence to confinement may be tolled. That occurs under Article 14, 10 U.S.C. 814, whenever a prisoner serving a sentence imposed by a court-martial is delivered to civilian authorities and is thereafter convicted of a crime in a civil court. The interruption of the military sentence persists until the prisoner is returned to military custody to complete his sentence.

that this is a judgment that Congress itself has conclusively made, however, this aspect of the statute has a demonstrably rational basis. First, the military has a substantial interest in the rapid rehabilitation of its members and their restoration to duty. See Hearings, *supra*, p. 1093. Second, such a provision for maximizing credit also serves to ameliorate somewhat the fact that, under the Uniform Code of Military Justice, all sentences must be served *consecutively*. See *United States* v. *Bryant*, 12 U.S.C.M.A. 133, 30 C.M.R. 133. Third, Congress may have taken into account the fact that persons sentenced to short terms of confinement could, unless given credit on their sentences from the date of adjudication, be made to remain in the armed forces pending the outcome of appellate review periods, and thus be compelled to serve their sentences after expiration of their normal term of service in the armed forces. See *Kahn* v. *Anderson*, 255 U.S. 1; Manual, para. 11(d).[9]

[9] As we noted in our responses to the application for a stay and the petition for certiorari, the Military Justice Act of 1968 (82 Stat. 1335) *inter alia* amends Article 57(b), effective August 1, 1969, so as to provide for a system whereby the officer having jurisdiction over a person convicted by general court-martial will have the power "in his sole discretion [to] defer service of the sentence to confinement", in which event the sentence will not run until it is ordered executed (82 Stat. 1341). This change was rather clearly based on the congressional understanding that "a sentence to confinement begins to run from the date it is adjudged" and that the requirement that a "suspension" of sentence can be vacated only after a hearing for cause means this procedure "cannot, therefore, be used effectively as a means of release pending appeal." S. Rep. No. 1691, 90th Cong., 2d Sess., p. 13. Under the new provision, the "de-

4. Our view that this proceeding became moot was not predicated on any disagreement with petitioner (see Pet. Br. pp. 70–71) over this Court's power to preserve the *status quo* pending review. Our suggestion of mootness rested merely on our belief that the order actually entered in this case by Mr. Justice Douglas did not toll the congressionally prescribed running of petitioner's sentence so as to preserve a live controversy between the parties over whether restraint constituted "execution" of the sentence. We have seen that Article 57(b) of the Code provides as a general rule for the running of a sentence to confinement from the date it is adjudged, irrespective of execution of the sentence or other restraint, and of course, in the absence of supervening authority, respondents must follow that command and the implementing regulations of the Secretary of the Air Force. The order entered in this case two days before the confinement sentence was to expire merely quoted from an order entered in another litigation with different issues, directing only that petitioner not be incarcerated or assigned to duties uncongenial to his conscience. Mr. Justice Douglas opinion and order (A. 27–28) nowhere referred to the prospective mootness of the case, but seemed concerned on its face

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ferment would be terminated and the sentence would begin to run automatically when the sentence is approved upon review and ordered executed." *Id.*, p. 14. This amendment would be superfluous if petitioner is correct in contending that Article 57(b) *currently* regards a sentence to confinement as tolled whenever the convicted accused is allowed to remain free from arrest or confinement pending appeal or is at some point during review released from restraint.

solely with, in effect, enlarging petitioner on personal recognizance pending action by the full Court. We regard it as questionable whether, under the system of military law ordained by Congress, that this "order of release" automatically operated to stay the sentence under Article 57(b) of the Code.

Nor does paragraph 97c of the Manual for Courts-Marital warrant that result.[10] That paragraph provides in pertinent part:

> *Interruptions of execution of a sentence.*—A sentence to confinement * * * is continuous until the term expires, with certain exceptions. These exceptions include the following:
>
> * * * * *
>
> Periods during which the person undergoing such a sentence is absent without authority, or is absent under a parole which proper authority has suspended and later revoked, or is erroneously released from confinement through misrepresentation or fraud on the part of the prisoner, or is erroneously released from confinement upon his petition for a writ of habeas corpus under a court order which is later reversed by a competent tribunal, shall be excluded in computing the service of the term of the punishment.

Accord, AR 633–30, AFR 125–30, ¶ 5. As petitioner states, the provisions of paragraph 97c are designed to supplement the basic principles of Article 57(b), in

[10] The Manual was promulgated by the President pursuant to the Code's authority to prescribe implementing rules and procedures. See Art. 36, 10 U.S.C. 836; *United States* v. *Augenblick*, 393 U.S. 348, 352.

light of the fact that "Congress did not mention all contingencies which would prevent an accused from being credited with time served." *United States* v. *Bryant,* 12 U.S.C.M.A. 133, 137, 30 C.M.R. 133, 137. Petitioner contends that the instances enumerated in paragraph 97c, *supra,* show "that the rationale of 97c is that a military prisoner who has been freed from confinement may not receive credit for time served during the period of his release" (Pet. Br. p. 72).

Neither respondents nor other military authorities, however, have ever pressed for such a sweeping restriction on the policy established by Congress in Article 57(b) of the Code. Paragraph 97c simply reflects a recognition of the type of circumstances, deemed implicit in Article 57(b), in which a military prisoner does not *deserve* to be credited with service of his sentence. Because these situations are exceptions to the general rule provided by Congress, they are necessarily limited in scope. Furthermore, they differ qualitatively from the circumstances of this case. The focus of the paragraph is, as its caption indicates, interruptions in the "execution" of a sentence, and as we show in Point III, *infra,* petitioner has not been ordered into the execution of his sentence. But more importantly, while we agree with petitioner that the examples may not be exhaustive, they demonstrate that the present situation is not *ejusdem generis.* The examples cited in the paragraph—which include escape, securing of freedom through fraud, and the obtaining of release from physical custody pursuant to an erroneous, subsequently reversed, court order on a petition for habeas corpus—clearly indicate that the

running of a military sentence should be deemed tolled only when the prisoner's freedom is secured by some wrongful or erroneous action. Indeed, in *Bryant, supra,* on which petitioner relies, the Court of Military Appeals went only so far as to say that Article 57(b) "does not state that a sentence once started may not be interrupted by the misdeeds of the accused." 12 U.S.C.M.A. at 138, 30 C.M.R. at 138. Although we opposed petitioner's release from restraint pending review of his certiorari petition, the granting of his request cannot in any relevant sense be said to have been either culpably wrongful or legally erroneous.

Paragraph 97c thus does not support an interpretation of Article 57(b) as depriving a prisoner of the automatic running of his sentence whenever he is ordered released from restraint by a court or is allowed by his commanding officer to remain under no restraint pending appeal.

5. If we are correct in believing that petitioner's sentence to confinement continued to run until it expired on December 26, 1968, and petitioner is thus no longer amenable to any confinement under his court-martial conviction, it is clear there is no longer any live dispute over whether the degrees of restraint to which he was subjected constituted premature "execution" of his sentence.[11] In the practical, concrete terms

[11] The question whether similar restraints would or would not be authorized for a person who no longer faces any prison sentence is not presented by the facts of this case. As petitioner states (Pet. Br. p. 73), he has now been restored to duty as Special Assistant to the Wing Commander.

which are the essence of a "case" or "controversy," neither that issue nor the exhaustion question has any significance for petitioner. The sentence which underlay the legal dispute has now terminated, leaving nothing more than a "speculative possibility" that petitioner could be adversely affected by dismissal of this suit as moot. See *Carroll* v. *President and Commissioners of Princess Anne County*, 393 U.S. 175, 178; *Bus Employees* v. *Missouri*, 374 U.S. 74, 78.[12] Nor is it pertinent to speculate about restraint after *another* court-martial (Pet. Br. pp. 73–74). Not only would such theoretical contingencies fail to establish the "sufficient immediacy and reality" warranting the relief now requested, *Golden* v. *Zwickler*, No. 370, O.T., 1968, decided March 4, 1969, but the possibility that petitioner would, or could, again be assigned to duties he might find in conflict with his conscience may fairly be termed minute (see note 4, *supra*).

6. We concede that the preceding argument is a technical one; that petitioner was seeking an order that would preserve the issue he sought to present; and that there is some indication Mr. Justice Douglas intended to prevent mootness and not just to provide interim relief. Since we have not suggested that a Justice of this Court, or any federal judge, is powerless to interrupt the running of a military sentence, we do not deny that Mr. Justice Douglas had the power to grant the relief requested. We are simply in

[12] Of course the separate proceedings to review the court-martial conviction itself do not suffer from this defect. See *Carafas* v. *LaVallee*, 391 U.S. 234; *Peyton* v. *Rowe*, 391 U.S. 54.

doubt (a) whether he did intend to toll the running of the sentence, and (b) whether the order entered authorizes respondents to treat petitioner's sentence as unexpired, notwithstanding Article 57(b) and Air Force regulations. Compare *International Longshoremen's Ass'n, Local 1291* v. *Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 73–76. Should the Court interpret the order of December 24, 1968, as sufficiently manifesting an intention to direct respondents not only to release petitioner and keep him from conscience conflicts, but also to treat his unexpired sentence as tolled, then we would concede that the case has not become moot.

II

THE COURT OF APPEALS PROPERLY DETERMINED THAT THE DISTRICT COURT SHOULD NOT HAVE EXERCISED JURISDICTION OVER THE PRESENT ACTION BECAUSE PETITIONER FAILED TO EXHAUST HIS MILITARY REMEDIES

Although the doctrine of exhaustion of remedies is not a jurisdictional bar to consideration of a habeas corpus action (see *Fay* v. *Noia*, 372 U.S. 391, 426–434), the rule serves as a useful procedural safeguard in our federal system against the friction which would result if a federal court were to entertain an action on the merits or grant relief where adequate remedies exist in a local forum. In *Gusik* v. *Schilder*, 340 U.S. 128, which involved an attack upon a court-martial conviction for murder, this Court held that the doctrine of exhaustion of military remedies applies to habeas corpus actions by military prisoners. The Court found that the rationale of the exhaustion doc-

trine was as pertinent in cases of collateral attack by military prisoners as it was in federal habeas corpus proceedings by State prisoners (340 U.S. at 132):[13]

> If an available procedure has not been employed to rectify the alleged error which the federal court is asked to correct, any interference by the federal court may be wholly needless. The procedure established to police the errors of the tribunal whose judgment is challenged may be adequate for the occasion. If it is, any friction between the federal court and the military or state tribunal is saved. * * * Such a principle of judicial administration is in no sense a suspension of the writ of habeas corpus. It is merely a deferment of resort to the writ until other corrective procedures are shown to be futile.

Petitioner takes the position, through various arguments, that the exhaustion of remedies doctrine is inapplicable in this case because the instant action, unlike *Gusik*, does not challenge the conduct of his court-martial proceedings, but the legality of the type of restraint imposed on him pending review of his conviction. We submit, however, that sound policies of judicial administration support the exhaustion requirement in cases arising from the military justice system, and those policies fully justify the decision below.

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[13] In *Gusik*, the policy against premature consideration of military claims by the federal courts was held to warrant application of the exhaustion doctrine even though the military remedy to which the Court held resort should be had, a motion for a new trial, did not exist at the time the habeas corpus action was filed and decided in the district court.

1. Petitioner argues initially that this case is within the exception to the exhaustion requirement in cases where the habeas corpus action challenges the right of military authorities to exercise any court-martial jurisdiction over the accused. See *United States* v. *McElroy*, 259 F. 2d 927 (C.A.D.C.), affirmed *sub nom. McElroy* v. *Guagliardo*, 361 U.S. 281; see also *Toth* v. *Quarles*, 350 U.S. 11; *Reid* v. *Covert*, 354 U.S. 1. We do not understand petitioner to contend, however, that his court-martial lacked *in personam* "jurisdiction" as that concept was applied in those cases.[14] It may be appropriate to suspend the exhaustion requirement in the relatively few cases where the petitioner collaterally attacks his confinement on the ground that he is not subject to any military authority and cannot be proceeded against in a court. But a claim that military authorities have erred in the application of military law, which is involved in this case, is not equivalent to an assertion

[14] It is therefore difficult to understand the formulation of the issue involved here, in Mr. Justice Douglas' memorandum order granting petitioner's application for release, as "whether the doctrine of exhaustion of military remedies applies where the question is whether the court martial authority acts outside its jurisdiction" (A. 28). Of course, the concept we are considering here with respect to the exhaustion doctrine is jurisdiction "in the traditional sense" (see Brief for the United States, pp. 49–54, *United States* v. *Augenblick*, No. 45, this Term), and must be distinguished from the expansive "jurisdiction" concept which served a transitional role in the enlargement of federal habeas corpus review of State convictions, see *Johnson* v. *Zerbst*, 304 U.S. 458.

of lack of any authority over the defendant;[15] such claims should be adjudicated in the first instance by the tribunals which were established exclusively to rule on them. Unless challenges to the type of custody or to the conduct of the conviction proceedings, which are necessarily present in *all* habeas corpus actions, are to be treated as equivalent to an assertion of lack of jurisdiction itself—and the exception to the exhaustion requirement thus permitted to devour the rule—the claim for relief in the present case clearly does not come within the "jurisdiction" exception.[16]

[15] Thus there is no conflict, as alleged by petitioner (Pet. Br. pp. 42–43), between the position taken by the court below and the established procedure permitting challenges to the validity of an induction order by bringing habeas corpus in a federal court immediately after submitting to induction. See, *e.g.*, *Eagles* v. *Samuels*, 329 U.S. 304; *Oestereich* v. *Selective Service Board*, 393 U.S. 233, 235–236 n. 5.

[16] Nothing in *Gallagher* v. *Quinn*, 363 F. 2d 301 (C.A.D.C.), certiorari denied, 385 U.S. 881, relied on by petitioner (Pet. Br. p. 26), is to the contrary. That case was not a habeas corpus attack on military jurisdiction, as petitioner's argument would indicate, but rather a civil injunction action brought by a discharged enlisted man whose petition for review of his court-martial conviction had previously been denied by the Court of Military Appeals; he claimed that that court had no power to refuse to hear his case and sought an injunction requiring the Court of Military Appeals to review his conviction on the merits. The federal court of appeals held that the federal courts had jurisdiction to entertain the contention that the statute granting the Court of Military Appeals discretion to deny review to him was unconstitutional, specifically noting that all "[o]ther remedies available afford no authority to anyone to grant the only relief he seeks in this litigation." 363 F. 2d at 304 n. 9. The court affirmed the district court's dismissal of the complaint.

Indeed, in his habeas corpus petition in the district court, petitioner did not make his present contention, but instead asserted that "on information and belief [he had] exhausted all effective military remedies" (A. 12).

Petitioner also contends that application of the exhaustion doctrine by the federal courts is appropriate only with respect to State proceedings in the interest of comity, but not with respect to military remedies because both the federal courts and the Armed Forces are agencies of the same sovereignty. But although inter-governmental confrontation is not involved where military custody is challenged, petitioner's argument ignores other policies which justify the rule in *Gusik* v. *Schilder, supra,* that military remedies must be exhausted before the federal courts will exercise their jurisdiction on habeas corpus. In the first place, the application of the exhaustion doctrine to military proceedings serves the same important pragmatic interest as its application to federal administrative proceedings: decreasing the volume of litigation in the courts by allowing the military to correct errors through its own internal review processes. Where full relief may promptly be obtained in the military courts, it makes good sense for the civilian court to encourage resort to that remedy, and discourage premature habeas corpus litigation, by declining to entertain the case on its merits.

More importantly, application of the exhaustion doctrine in cases of this type ensures that the federal civilian courts, which have ultimate jurisdiction to

rule on the legal issues presented by military prisoners, will have the fullest advantage of the expertise and the analysis of the military tribunals on those issues. This Court has recognized that the exercise of military authority and the system of military justice involve concepts and practices which differ significantly from other governmental functions and from the common law traditions of the federal courts (see *Burns* v. *Wilson,* 346 U.S. 137, 140; *Orloff* v. *Willoughby,* 345 U.S. 83, 94). The fact that federal judges are unlikely to have any significant familiarity with military law and military society strongly supports this Court's holding in *Burns* v. *Wilson, supra,* that the federal civilian courts should defer to the decisions of military tribunals when it appears that the military justice system has afforded full and fair consideration of the issues (see also *Whelchel* v. *McDonald,* 340 U.S. 122, 124; *United States* v. *Augenblick,* 393 U.S. 348, 352). The policies which underlie this deference, which results in a narrower scope of review on federal habeas corpus of military courts-martial than of State criminal convictions, similarly suggest that questions of military law which may be raised in the civilian courts should be presented fully in the first instance to the military tribunals.

The issues involved in this action, which challenges the type of restraint imposed on petitioner rather than the conduct of his court-martial proceedings, present a particularly strong case for application of the exhaustion requirement. Although all such challenges would not be cognizable in the civilian courts (see pp. 45–49, *infra*), the questions of law which

would be at issue in those courts involve, as we detail in Part III, a number of technical provisions of the Uniform Code of Military Justice and the Manual for Courts-Martial; and, under petitioner's argument, challenges to the type of restraint presumably could be raised at any time in the process, from before conviction until the sentence is fully served. The problem of what constitutes an "execution" of sentence, involved in this case, for example, presents the federal habeas corpus court with novel issues arising in an unfamiliar system and frequently requiring the application of special military considerations to the narrow facts of a particular case. Sound judicial administration counsels against the rule urged by petitioner, which would engage the federal courts in such an exercise while there remain adequate military remedies which, at the least, would provide additional opportunity for analysis of the issues and a further sifting of the facts.

While petitioner contends that the Court of Military Appeals would be overwhelmed with habeas corpus applications under the government's submission, he makes no showing that the court has been in any way burdened by such applications in the twenty months since it announced its willingness to entertain motions for collateral relief. The short answer to petitioner's argument is that any difficulty which the Court of Military Appeals might encounter at some future time in handling extraordinary writs may be inquired into, in a particular case, on the question whether the military remedy is prompt and adequate. Petitioner's

conjecture is not an adequate reason at this time for inviting the federal courts to become courts of first resort on questions of military custody.

2. The court of appeals in the present case found that petitioner had not exhausted his military remedies through his failure to seek habeas corpus in the Court of Military Appeals (A. 26).[17] In July 1967, nearly a year before the instant federal habeas corpus action was begun, the Court of Military Appeals unanimously held that it had the power to issue such a writ in an appropriate case to relieve a military defendant of illegal restraint pending review of a court-martial conviction. *Levy* v. *Resor*, 17 U.S.C.M.A. 135, 37 C.M.R. 399. And more recently, in *United States* v. *Bevilacqua*, 18 U.S.C.M.A. 10, 12, 39 C.M.R. 10, 12,

[17] The court also found that presentation of petitioner's habeas corpus contentions in the court-martial appeal proceeding, which the court incorrectly understood was then pending before the Air Force Board of Review, was a viable military remedy (A. 26 and n. 4). While we believe that a habeas corpus application in the Court of Military Appeals constituted petitioner's most effective and expeditious remedy, and thus confine our discussion to the failure to exhaust that avenue, we agree with the court below that resort to the Board of Review would also have afforded effective relief. See cases cited at A. 26 n. 4. The sole basis of petitioner's opposition is apparently that review of the restraint issues on the appeal of the conviction would have taken too long (Pet. Br. pp. 27–29). However, there is no reason why expedition as to the collateral issue of petitioner's restraint could not have been sought and granted by the Board of Review. There is no basis for assuming, in the absence of any such attempt by petitioner, that the time consumed by the Air Force Board of Review on this issue would have been excessive or taken longer than recourse to the federal courts. See *United States* v. *Lucero*, 18 C.M.R. 942.

the same court stated that "an accused who has been deprived of his rights need not go outside the military justice system to find relief in the civilian courts of the Federal judiciary." See also *United States* v. *Augenblick*, 393 U.S. 348, 350, describing the habeas corpus jurisdiction of the Court of Military Appeals as affording an "additional remedy, apparently now available."

Petitioner does not contend that the relief available in the Court of Military Appeals would be any less comprehensive than the remedy which he sought in the district court. Nor is it argued that any delay in ruling on the application would render the military remedy significantly less effective than the civil writ.[18] Petitioner does suggest, however, with some deference to the good faith of the Court of Military Appeals (Pet. Br. pp. 35–37), that relief in that court is presently inadequate because, in the few cases on extraordinary writs presented to it to date, the court has not yet granted relief. A reading of the cases cited by petitioner, however, does not reveal any hesitancy to vindicate the rights asserted, but rather shows that

[18] In *Levy* v. *Resor*, 17 U.S.C.M.A. 135, the petition was filed on June 20, 1967, and, after hearing oral argument, the Court of Military Appeals filed its written opinion on July 7, 1967. The petition in the present case was filed in the district court on May 16, 1968, and the district court announced its decision orally on May 23, 1968, after a hearing on that date. Petitioner also notes (Pet. Br. p. 36 n. 17) that a subsequent habeas corpus application by Captain Levy challenging his transfer to Fort Leavenworth after that transfer had been approved by the Fourth Circuit (*Levy* v. *Resor*, 384 F.2d 689, certiorari denied, 389 U.S. 1049), was ruled on, and denied, by the Court of Military Appeals within five days after it was filed.

the applications in those cases were properly denied on their facts. Although the Court of Military Appeals, in *Levy* v. *Resor*, 17 U.S.C.M.A. 135, had decided, adversely to petitioner, the basic question of the power of the military to place a convicted defendant under some sort of restraint pending review of his court-martial, the court there declared itself willing and able to review particular claims that the type of confinement imposed was unlawful. See also *United States* v. *Bevilacqua*, 18 U.S.C.M.A. 10, 39 C.M.R. 10. But even if petitioner believed that he had no chance of obtaining relief on the facts of this case, that would not excuse his failure to pursue the remedy. *Gusik* v. *Schilder, supra*, 340 U.S. at 133.

Finally, the court below correctly held that the exhaustion doctrine was applicable even though the present action did not challenge the underlying conviction but rather the type of restraint imposed pending appellate review (A. 26). Indeed, the fact that this issue is incidental to a court-martial proceeding under military jurisdiction would seem to render resort to military remedies particularly appropriate. See *Orloff* v. *Willoughby*, 345 U.S. 83, 94; *Beard* v. *Stahr*, 370 U.S. 41. This Court has held that the exhaustion doctrine is applicable in the comparable situation where bail in respect of a pending criminal prosecution is sought in the federal courts. *Stack* v. *Boyle*, 342 U.S. 1, 6–7; compare *Dawkins* v. *Crevasse*, 391 F. 2d 921 (C.A. 5) (bail sought in federal court only after State court remedies exhausted). Similarly, the Tenth Circuit has held that the failure to exhaust military remedies precluded federal habeas

corpus relief to a military prisoner who alleged that his second court-martial trial would place him in double jeopardy. *Gorko* v. *Commanding Officer*, 314 F. 2d 858 (C.A. 10). The court held that the petitioner had an adequate opportunity to present that claim to the military courts in the court-martial proceeding. So also here, the Court of Military Appeals, which clearly would have had jurisdiction to entertain the present action, could have given full and adequate consideration to petitioner's claims of unlawful restraint pending appellate review of his conviction. By neglecting to pursue that opportunity for satisfactory disposition of his complaint by the military courts, petitioner rendered the present habeas corpus action premature for federal-court disposition on the merits. *Gusik* v. *Schilder*, 340 U.S. 128; see *Beard* v. *Stahr*, 370 U.S. 41; *Orloff* v. *Willoughby*, 345 U.S. 83, 94.[19]

[19] There is no merit to petitioner's further contention (Pet. Br. pp. 29–30) that exhaustion was not required, under *Oestereich* v. *Selective Service Board*, 393 U.S. 233, because the action of the military in seeking to transfer petitioner pending completion of appellate review to the Disciplinary Barracks at Fort Leavenworth constituted a "clear departure * * * from * * * statutory mandate." As we shall show in Part III, *infra*, any violation of the Uniform Code of Military Justice in this regard was hardly "clear". Compare *Clark* v. *Gabriel*, 393 U.S. 256. Moreover, *Oestereich* did not involve application of the general doctrine of exhaustion of remedies (see 393 U.S. at 246–250 (dissenting opinion)), but rather the interpretation of a particular Congressional enactment providing that there could be no pre-induction judicial review of a Selective Service classification. The principles laid down in *Oestereich* to deal with that special statute are thus not applicable here. See Brief for the United States, pp. 13–14 & nn. 6–7, 24–25 n. 14, *McKart* v. *United States*, No. 403, this Term.

III

THE UNIFORM CODE OF MILITARY JUSTICE AND THE MANUAL FOR COURTS-MARTIAL AUTHORIZED IMPOSITION OF RESTRAINT UPON PETITIONER PENDING APPELLATE REVIEW OF HIS COURT-MARTIAL CONVICTION

If the Court concludes that the case is not moot and that attention to petitioner's claims was inappropriately declined below for failure to resort first to military remedies, the Court could remand the case to the court of appeals for consideration on the merits. We believe, however, that final action by this Court would be both permissible and proper. In addition to the district court below, several other courts have addressed themselves to the questions that remain in the present case. *E.g., Levy* v. *Resor,* 17 U.S.C.M.A. 135, 37 C.M.R. 399; *Levy* v. *Resor,* 384 F. 2d 689 (C.A. 4), certiorari denied, 389 U.S. 1049; *Levy* v. *Dillon,* 286 F. Supp. 593 (D. Kan.), appeal pending (C.A. 10). Furthermore, since the direct proceedings reviewing petitioner's court-martial conviction have now reached their final stages before the Court of Military Appeals, speedy resolution of the collateral issues here involved would seem in order.

The habeas corpus petition in the district court made two contentions: that the proposed transfer to Fort Leavenworth pending completion of appellate review was illegal (A. 11; see A. 18, 20); and that any

continued restraint was improper (A. 12–13; see A. 18–19).[20]

A. THE PROPOSED TRANSFER TO FORT LEAVENWORTH WAS LEGAL

The issue of the proposed transfer to Fort Leavenworth remains in this case only insofar as petitioner relies on the allegedly "clear" invalidity of that order as justifying his failure to exhaust administrative

[20] This latter contention was based in part on petitioner's argument (A. 7–10, 13; Pet. Br. pp. 64–69) that the restraints pending appeal denied him due process because at no time before or during his court-martial was he permitted to defend on the basis of his theory that the allegedly erroneous refusal of the Secretary of the Air Force to grant relief on account of petitioner's "selective conscientious objection" constituted a defense to the charges. Petitioner asserts that when he attempted to challenge the Secretary's action in a civil proceeding, the Solicitor General represented to this Court that petitioner could raise this claim as a defense to a court-martial. This is not so. Our response was only that the contention should first be *raised* within the military trial system to give those courts the initial opportunity to decide *whether* allegedly erroneous action by the Secretary of the Air Force should be recognized as an excuse for disobeying certain orders. (See Memorandum for the United States in Opposition, pp. 7–8 n. 4, No. 722, O.T. 1967.) That precise question is now before the Court of Military Appeals on review of petitioner's court-martial conviction. Review of that question by this Court at this time is plainly premature. *Gusik* v. *Schilder*, 340 U.S. 128.

That military courts have held (thus far, at least) that petitioner's claim is *not* a legitimate defense is quite different from denying him the opportunity to raise and litigate a defense cognizable in law. Due process is not offended by imposing restraint on a defendant convicted in a civilian court while he seeks to convince a reviewing court that his claims were improperly rejected below. There is even less foundation for an allegation of denial of due process in the present case.

remedies (Pet. Br. pp. 29–30, 53 n. 23).[21] The argument is self-defeating, however, for as the court below noted (A. 26 and n. 4), claims of illegal, premature "execution" of military sentences can be speedily passed upon by the military courts, and the more clear the alleged violation the less reason, it would appear, for carrying the complaint outside the traditional channels Congress has prescribed for the supervision of military justice. But, as the following discussion will show, the alleged violation was anything but "clear"; indeed, we believe an informed understanding of the terms and concepts of the Uniform Code will show that there was no violation at all. At the very least this discussion will underscore the propriety—in the military justice field no less than in the field of administrative regulation—of resorting first to the expert tribunals conversant with the entire complex of statutes and regulations. In the event the Court concludes that the question should be decided in the present context *de novo*, without the benefit of the analysis of the specialized court created by Congress and entrusted with the primary responsibility for interpreting the Uniform Code, we shall endeavor to expose the logical flaw in petitioner's contention that any transfer to Fort Leavenworth must, "in effect, amount to execution" (A. 19) of his sentence to hard labor.

[21] Only prisoners with more than six-months confinement left to serve may be committed to a disciplinary barracks. See AF Manual 125–2, ¶ 6–8.

Article 71(c) of the Uniform Code provides:

> No sentence which includes, unsuspended, a dishonorable or bad-conduct discharge, or confinement for one year or more, may be executed until affirmed by a board of review and, in cases reviewed by it, the Court of Military Appeals.

Neither the Code nor the Manual, however, defines what is meant by "execution" of a sentence. The board of review cases catalogued by petitioner (Br. pp. 50–53) do not illuminate the question because in each of those instances—all arising in the early 1950's shortly after the enactment of the Code—the convening authorities, unfamiliar with Article 71(c)'s broadening of the categories of sentences which could not be executed immediately, had actually directed that lengthy confinement sentences or punitive discharges be "executed." In no case was there a question whether restraint pending appellate review constitutes "execution" of a sentence to confinement.

The only authority cited by petitioner (Br. p. 55) as defining the term "execution" as used in military law, *Sweet* v. *Taylor*, 178 F. Supp. 456, 460 (D. Kan.), though arising in a distinguishable context,[22] states a workable definition: "To execute means to carry out, to perform," and we agree to its relevance. In this light, it becomes evident that the proposed transfer

[22] *Sweet* involved a pre-Code offense, trial, and review; the question was whether under reviewing authorities' power, pursuant to a 1926 Manual, to "execute" a sentence, they could alter the type of institution in which the accused had been sentenced to be confined so as to change his confinement from a reformatory to a penitentiary.

would not have "carried out" or forced petitioner to "perform" his sentence to be confined at hard labor for a year.[23]

The consistent interpretation of the officials charged by Congress with the responsibility for implementing the statutory scheme belies petitioner's contention. Cf. *Udall* v. *Tallman*, 380 U.S. 1, 4. Thus, the Manual for Courts-Martial, promulgated by the President pursuant to Article 36, 10 U.S.C. 836, recognizes that the convening authority may provide for confinement in two quite distinct situations: for execution of the sentence (when permissible prior to completion of appellate review), and simply, for interim restraint pending review. Paragraph 89c of the Manual provides relevantly:

* * * * *

> (5) *Place of confinement.*—If the convening authority orders a sentence of confinement at hard labor into execution, the place of confinement, as prescribed in pertinent departmental regulations, will be designated in his action. When a sentence of confinement is ordered into execution subsequent to the initial action of

[23] Petitioner argued in the court below that the sentence to confinement at hard labor was severable into its elements and thus that the imposition of confinement pending appeal "executed" the confinement portion of the sentence adjudged by the court-martial. The sentence is not severable, however. The Manual clearly provides that in the case of a convicted officer a sentence to confinement *must* include hard labor. Manual, para. 126j. Nor may hard labor without confinement be imposed upon an officer by a court-martial. Manual, para. 126k. Thus, the proposed transfer and the type of restraint to which petitioner was subjected in this case did not "execute" (in the sense of "carry out") the sentence of the court-martial to confinement at hard labor.

the convening authority, the authority ordering such execution will designate the place of confinement in the promulgating order. In this connection, see 93.

(6) *Temporary custody.*—When a record of trial involving an approved sentence is required to be forwarded to the appropriate Judge Advocate General (Art. 65*a*, b), the convening authority will, unless he orders any approved sentence of confinement into execution and designates a place of confinement, provide in his action for the temporary custody of the accused pending final disposition of the case upon appellate review. If practicable, the accused in such a case should be retained within the command of the officer exercising general court-martial jurisdiction over the accused until the sentence has become final after completion of any appellate review. See appendix 14 (form 34) for form of action and 96 for action to be taken in event the place of temporary custody (confinement) is changed prior to final disposition of the case upon appellate review.

See, also, para. 93: AF Manual 125–2, 16–16. In the present case, the convening authority sought to do no more than exercise his responsibility, under subparagraph (6), *supra,* to provide for petitioner's temporary custody—which the subparagraph recognizes may extend to "confinement" —"[p]ending completion of appellate review * * *" (A. 31). See *United States* v. *Petroff-Tachomakoff,* 5 U.S.C.M.A. 824, 826, 19 C.M.R. 120, 122.

Although the subparagraph indicates that ordinarily the accused should be retained within the local

command, it qualifies this ordinary goal with the caveat, "If practicable". Because special problems are presented by court-martialed officers, the Secretary of the Air Force has directed that, pending final action upon appellate review, a convicted officer will be "assigned to an installation having adequate facilities for the amount of restraint the commander thinks necessary pending final action on the case." AF Manual 125–2, ¶ 6–16a.[24]

There is clear judicial authority that what may be practicable for enlisted men may not suffice for officer prisoners. Thus, in *Levy* v. *Resor,* 384 F. 2d 689 (C.A. 4), certiorari denied, 389 U.S. 1049, the Army sought permission to transfer a court-martialed captain, whose sentence to three-years' confinement at hard labor and dismissal was being reviewed by a board of review, from his post to the disciplinary barracks at Fort Leavenworth while his military and civilian (bail) appeals were being considered. The court upheld the Army's decision to transfer him, finding that Fort Leavenworth

> has suitable facilities for the custody of officer prisoners, and * * * the transfer would be in

[24] The Secretary has generally provided that "adjudged" personnel—those under a sentence to confinement which has not been ordered executed pending final appellate action—"will ordinarily be committed to the disciplinary barracks nearest the place of trial for confinement pending completion of appellate review (unless retention within the trial area is thought necessary) * * *" if they are considered "nonrestorable." AF Manual 125–2, ¶ 6–8b. Unless they are found to be contrary to the Code, such regulations "implementing the codal requirements" have the force of law. *United States* v. *Byrant,* 12 U.S.C.M.A. 133, 138, 30 C.M.R. 133, 138.

> accordance with the customary handling of such prisoners * * *.

384 F. 2d at 690. See, also, AR 633–5, ¶ 4b(2). There was no suggestion that this transfer would constitute premature "execution" of Levy's sentence in violation of Article 71(c) of the Uniform Code. That decision was recently followed in a well-reasoned opinion of the district court in Kansas (*Levy* v. *Dillon,* 286 F. Supp. 593, appeal pending (C.A. 10)), specifically considering the Article 71(c) contention and expressly disapproving the decision of the district court in the instant case that such a transfer would "amount to" (A. 19) a violation of that Article.

These holdings are sound. The district court in this case agreed that military authorities have lawful discretion, consonant with Article 71(c), to impose restraint, including confinement, upon a military accused while the results of appellate review are awaited (A. 19, 20). Any other conclusion would have meant, of course, that the manuals and regulations issued by the President and the Service Secretaries to implement the Code have misunderstood the scope of the term "executed" in Article 71(c). The district judge ruled, however, without any explanation or factual support, that it seemed to him that transfer to this particular disciplinary barracks would illegally "execute" the sentence. The court's conclusion apparently rested in part on the accurate understanding that the Barracks is the type of institution

at which petitioner's sentence to confinement *could* appropriately be "executed" upon completion of appellate review. See Article 58, 10 U.S.C. 858. But the court also appears to have relied on a clearly erroneous assumption that "the sentence provided he was going to Leavenworth for a year" (Tr. 58). The district judge explained: "I am saying that sending him to Leavenworth is in effect executing the sentence because that is where the sentence says he had to go to serve the sentence" (Tr. 62). But this critical premise in the court's reasoning is simply wrong. As in this case, a sentence of a court-martial does *not* fix the place for service of the sentence but merely pronounces the punishment. The place of execution of the sentence is not determined until the sentence is finally ordered executed and the determination is made by the authority promulgating that order. See Manual, paras. 89(c)(5), 93. In this case, of course, the convening authority in approving the sentence purported to do no more than provide for *interim custody* at Fort Leavenworth pending appellate review. See A. 31; Manual, para. 89(c)(6), *supra*, p. 40.[25]

In this Court, petitioner's basic argument on this issue is similar—that because the Disciplinary Barracks at Fort Leavenworth is a maximum security military prison, confinement there must be considered

[25] The reference to Fort Leavenworth in the Staff Judge Advocate's memorandum does not have the sinister meaning petitioner would attribute to it (Br. p. 55 n. 26); taken in context, this was nothing more than the recommendation, accepted by the convening authority, that petitioner be transferred there pending review.

as punitive and thus as "execution" of the sentence (Pet. Br. pp. 56–57). As noted in *Levy* v. *Dillon, supra,* however, the circumstances under which an "adjudged" officer-prisoner is confined differ significantly, under military regulations, from those of a "sentenced" prisoner, whose sentence has been ordered executed.[26] The most pertinent distinction relevant to whether a sentence to hard labor is being "executed," in the sense of being "carried out" or "performed," *Sweet* v. *Taylor, supra,* is of course whether petitioner could have been compelled to do hard labor. On this crucial question Air Force regulations are quite specific, providing that "adjudged" officers who are in confinement "are not required to perform labor except for the necessary policing of their own quarters." AF Manual 125–2, ¶ 2–16d. In addition, even in confinement at Fort Leavenworth, petitioner would have retained the privileges of his rank of captain (since his dismissal from the Air Force cannot be executed until appellate review has been completed) and could have continued to wear his service uniform, with any decorations and insignia, rather than the work uni-

[26] "An 'adjudged' prisoner is a person who has been tried by court-martial and sentenced to confinement, but whose sentence has not yet been approved or ordered executed." "A 'sentenced' prisoner is a person who has been convicted by court-martial and whose sentence has been approved and ordered executed as required by law." *United States* v. *Nelson*, U.S.C.M.A. No. 21,512, decided March 14, 1969, Slip Op., nn. 2–3. See, also, AF Manual 125–2, Att. 1.

form normally worn by sentenced prisoners subject to hard labor. AF Manual 125–2, ¶ 3–5b.[27]

We assume the district judge was unaware of these dispositive circumstances when he ruled from the bench that the proposed transfer to Fort Leavenworth would have amounted to illegal "execution" of petitioner's sentence. Petitioner's failure to raise this contention either on appeal to a board of review or by application to the Court of Military Appeals for extraordinary relief may, in these circumstances, reflect a belief that the tribunals with expertise in this area would probably have rejected the claim—and properly so. Compare *Gusik* v. *Schilder,* 340 U.S. 128, 133.

B. MILITARY SUPERIORS HAVE AUTHORITY TO PLACE A PERSON CONVICTED BY COURT-MARTIAL UNDER RESTRAINT PENDING APPELLATE REVEIW OF HIS CONVICTION

Apart from his allegation that the proposed transfer to Fort Leavenworth would constitute illegal execution of his sentence, petitioner also argued that no restraint on him was warranted pending review of his conviction and that the district court should order

[27] While not strictly relevant, we note that petitioner errs in his assertion (Pet. Br. p. 57) that "all" of petitioner's mail would be "censored." Outgoing mail to the President, Vice President, Members of Congress, Attorney General, Judge Advocate General and their representatives, defense counsel, attorneys of record, chaplains and clergymen, *inter alia*, is all privileged. Other outgoing and incoming mail is *inspected*, not censored, as a matter of security. See Manual For the Guidance of Prisoners, United States Disciplinary Barracks, Fort Leavenworth, Kansas (1967 ed.) pp. 17–18.

him released. See A. 13–14. On this latter question, relief was denied, with the explanation (A. 19):

> the right of a person in the military service to bail pending appeal from conviction is not constitutional, but statutory only, and * * *, in the military, there is no statutory provision for such bail. This Court * * * concludes that it has no right to say what bail, if any, should be set for the petitioner, nor to state what conditions of release, if any, should be imposed. Those matters are properly within the discretion of the military authority, and it may be that the appropriate officials will feel that petitioner should be confined during the review procedures. * * *

This holding was sound. The district court properly found itself without jurisdiction on habeas corpus to review the discretionary determination of petitioner's superior officers to impose post-conviction restraint on him. This Court has consistently ruled that habeas corpus does not lie to review the propriety of a discretionary determination made as part of the court-martial process under the Uniform Code and the Manual for Courts-Martial. *E.g., Whelchel* v. *McDonald,* 340 U.S. 122, 124; *Jackson* v. *Taylor,* 353 U.S. 569, 578 n. 10; cf. *United States* v. *Augenblick,* 393 U.S. 348, 352. Accordingly, the only question conceivably open to review in this proceeding is whether post-conviction restraint on military prisoners is authorized by law; if so, under this Court's settled holdings, the choice made by the military commander is not collaterally reviewable.

1. Tested by these standards, modifications in peti-

tioner's position, as significantly modified during this litigation, does not establish even a threshold basis for the habeas corpus jurisdiction of the federal civilian courts.

In his petition for a writ of habeas corpus, petitioner argued that *no* restraint upon him pending appellate review would be legal. In part this contention was based upon the erroneous premise that any restraint would involve "service" of his sentence, which would violate due process in the event his conviction were later reversed. See A. 11. As we have seen above, a military accused receives credit toward the "service" of his sentence whether or not he is in confinement and, what is more, confinement does not necessarily constitute "execution" of a sentence. This contention, however, was abandoned in the district court, and responsibly so, since the argument would analogously have turned every denial of post-conviction bail in the civilian courts—or even the grant of bail subject to restrictions—into a due process violation because of the possibility that the underlying conviction might subsequently be reversed. Thus, this challenge to the validity of post-conviction restraint has been removed from the case.

Petitioner also argued initially in his pleading in the district court that no restraint was *necessary* in this case (see A. 13), but this argument too was modified critically. Thus, at the hearing his counsel expressly conceded that, instead of ordering petitioner transferred to Fort Leavenworth, "the general can keep him in quarters arrest until—as a fair compro-

mise pending appeal—even though we urge that it is not" (Tr. 53). And petitioner now admits that some restraint may well have been authorized, arguing only that "physical confinement" beyond mere "moral restraint" was not warranted. See Br. pp. 61–62.

If these concessions are accepted at face value, however, two district grounds justify affirmance without further study. First, as we have observed, this Court has consistently disclaimed the existence of jurisdiction in civil courts on habeas corpus to review the choices made by court-martial authorities from among the range of alternatives allowed by law. That salutary principle applies with equal force and policy to the field commander's assessment of the type of restraint, if any, that should be imposed upon one of his subordinate officers awaiting review of his court-martial conviction and sentence to dismissal and confinement at hard labor.

And second, in the terms of his concession, petitioner has never been under a form of restraint other than the "moral" compulsion involved in being ordered into arrest. He averred in the district court that from the time his sentence was adjudged he was placed "in the status of arrest in quarters" (A. 4). As modified when the transfer to Fort Leavenworth was cancelled, this arrest status continued until petitioner was released pursuant to Mr. Justice Douglas' order. Article 9(a) of the Code, 10 U.S.C. 809(a), provides:

> Arrest is the restraint of a person by an order, not imposed as a punishment for an of-

> fense, directing him to remain within certain specified limits. Confinement is the physical restraint of a person.

The Manual expands upon the difference, explaining:

> [a]rrest is moral restraint imposed upon a person by oral or written orders of competent authority limiting the person's personal liberty pending disposition of charges. The restraint imposed is binding upon the person arrested, not by physical force, but by virtue of his moral and legal obligation to obey the order of arrest. * * *

Para. 20a. As the base commander's letter modifying petitioner's arrest status shows (A. 32–34), petitioner was not locked in his room and was not under guard; he was expressly authorized to visit eight different facilities and was advised: "You will not be escorted on these trips" (A. 33). Thus, petitioner's status fits squarely within the degree of restraint even he seems to have conceded was appropriate.

Nevertheless, since these concessions may have been unintentionally dispositive, we shall trace the origin of a commanding officer's authority to impose post-conviction restraint pending appellate review. Our purpose will be to demonstrate that petitioner was lawfully subject to restraint pending appellate review, and a civil court on habeas corpus may inquire no further.

2. That some restraint, even confinement, may be imposed even before a sentence can be ordered ex-

ectued is at least implicit in the Uniform Code.[28] As previously discussed, Article 57(b) of the Code directs that a sentence to confinement imposed by a court-martial commences to run, unless suspended, as of the date it is adjudged, *irrespective* of whether any restraint is imposed on the convicted serviceman. The purpose of the article was "to prevent accused persons from languishing *in confinement* between sentence and date of execution without receiving credit therefor", *United States* v. *Bryant*, 12 U.S.C.M.A. 133, 138, 30 C.M.R. 133, 138 (emphasis supplied). This purpose manifests an understanding that there could be confinement of military prisoners pending "execution" of the sentence. Both military and civilian courts have ruled that, under the statutory and regulatory scheme of the Uniform Code as a whole, military authorities may lawfully impose restraint upon convicted military prisoners pending appellate review. See, *e.g.*, *Levy* v. *Resor*, 17 U.S.C.M.A. 135, 37 C.M.R. 399; *Levy* v. *Resor*, 384 F. 2d 689 (C.A. 4), certiorari denied, 389 U.S. 1049; *Levy* v. *Dillon*, 286 F. Supp. 593 (D. Kan.), appeal pending (C.A. 10).

[28] Article 13, 10 U.S.C. 813, speaks of the allowable forms of restraint that can be imposed upon a person held for trial "or the result of trial". While that Article is captioned only "Punishment prohibited before trial" and the Manual (para. 21d) uses the phrase "result of a trial" only with reference to the finding of guilty or not guilty, the Court of Military Appeals has found in Art. 13 authority to impose post-conviction restraint pending appellate review. *United States* v. *Teague*, 3 U.S.C.M.A. 317, 324, 12 C.M.R. 73, 80.

This conclusion is borne out by the provisions of the Manual. Paragraph 21d provides:

> Responsibility for restraint after trial. Upon notification from a trial counsel of the result of a trial (44*e*(2)), a commanding officer will take prompt and appropriate action with respect to the restraint of the person tried. Such action, depending on the circumstances, may involve the immediate release of the person from any restraint, *or the imposition of any necessary restraint pending final action on the case* (emphasis added).[29]

In the *Levy* cases both the Court of Appeals for the Fourth Circuit and the Court of Military Appeals ruled that the restraint imposed on Captain Levy pending appeal of his court-martial conviction—*i.e.*, placing him in a room in the post hospital under twenty-four hour guard—was lawful under paragraph 21d. By contrast, in the present case, petitioner was merely ordered into arrest, but he was allowed to leave his room in the Visiting Officers' Quarters to carry on routine activities without escort, was permitted to have maid service and a television, and was entitled to receive regular visits from his family and friends. See A. 32–34.

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[29] In the *Levy* case, *supra*, the Court of Military Appeals observed:

> While it seems more likely that that portion of the paragraph relating to "the immediate release of the person from any restraint" applies to those accused who have been acquitted by judgment of the court (see paragraph 22), we will assume that it also applies to convicted persons awaiting final action. * * *

17 U.S.C.M.A. at 140, 37 C.M.R. at 404.

3. Petitioner argues, however (Pet. Br. pp. 58–59), that Article 13 of the Code, 10 U.S.C. 813, conditions the purposes for which post-conviction restraint may be imposed. That article provides that:

> Subject to section 857 of this title (Article 57), no person, while being held for trial or the result of trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances require to insure his presence, but he may be subjected to minor punishment during that period for infractions of discipline.

Petitioner contends that the phrase "while being held for * * * the result of trial" embraces not only the time before verdict, but the period of appellate review. From this he concludes that the stricture against imposition of any restraint "more rigorous than the circumstances require to insure [the accused's] presence" establishes the *sole* justification for post-conviction restraint. He points to the decisions in *United States* v. *Teague,* 3 U.S.C.M.A. 317, 12 C.M.R. 73, and *United States* v. *Petroff-Tachomakoff,* 5 U.S.C.M.A. 824, 19 C.M.R. 120, as interpreting the phrase "held for * * * the result of trial" to "include post-conviction military personnel who were awaiting the results of the military appellate process" (Pet. Br. p. 58).

While those cases do find express statutory support in Article 13 for imposing post-conviction restraint,

they do not hold that the permissible grounds for pretrial restraint are also the *only* justification for posttrial restraint. In both cases, the imposition of restraint on persons convicted by court-martial was upheld under the authority of paragraph 21d of the Manual, as necessary to insure the presence of the accused throughout the appellate proceedings. The court did not, however, purport to hold that this was the only reason which *could* validly be given for sustaining the imposition of post-conviction restraint in any case. Rather, its opinions were geared to the particular circumstance that the enlisted men in each of those cases had dubious attendance records, thus making the purpose of insuring continued presence the most obvious basis for restraint. In analyzing the relationship between Article 13 of the Code and paragraph 21d of the Manual, which is concerned solely with post-conviction restraint, the *Teague* opinion concludes that the "Manual provision is *supplemental,* and not contradictory, to the provisions of the Code." 3 U.S.C.M.A. at 324, 12 C.M.R. at 80 (emphasis added). Indeed, any other interpretation would lead to the anomalous conclusion that a *civilian* defendant would be subject to restraint after conviction which would not be lawful for a member of the highly disciplined military establishment; it has long been recognized, by Congress and this Court, that civilian defendants may be denied release on bond *after* conviction for reasons other than likelihood of flight. See

18 U.S.C. 3148; F.R. Crim. P. 46(a)(2); *Carlson* v. *Landon*, 342 U.S. 524, 545 n. 45; *Stack* v. *Boyle*, 342 U.S. 1, 18 (opinion of Jackson, J.); *Carbo* v. *United States*, 82 S. Ct. 662 (Douglas, J.), review denied. 369 U.S. 868. Military law, like civilian, recognizes a meaningful difference in status between those who are mere accused and those who have been found guilty—even though the conviction is not yet final. See, *e.g.*, *United States* v. *Nelson*, U.S.C.M.A. No. 21,512, decided March 14, 1969.[30]

4. The question remains as to what restraint is proper with respect to an "adjudged" prisoner. We agree that what petitioner describes as "penal incarceration" or "punitive incarceration" (Br. pp. 50, 52, 55) would not be permitted by the Code. It seems evident that the purpose of the prohibition in Article 71(c) against "execution" of a sentence to confinement before appellate approval is to preclude the imposition of restraint which amounts to punishment. The Manual carries through on this policy, directing (para. 18b(3)):

> Other than restraint administered as prescribed in this subparagraph * * * no punishment may

[30] In fact, prior to the deferment-of-sentence provision of the Military Justice Act of 1968, to be effective later this year (82 Stat. 1335, 1341), see note 9, *supra*, neither the Congress nor the President had provided for any analogue to bail for military prisoners. See *Levy* v. *Resor*, *supra*, 17 U.S.C.M.A. at 137–140, 37 C.M.R. at 401–404. The Bail Reform Act of 1966 was expressly made inapplicable to offenses triable by court-martial. See 18 U.S.C. 3152(2).

> be imposed upon an accused as a result of trial by court-martial until the sentence has been approved and ordered executed.

This means, of course, as the Manual explains (paras. 18(b)(3), 125) and Air Force regulations specify (AF Manual 125–2, ¶2–16d), that pending review, a person convicted by court-martial cannot be put to hard labor; it does not mean that restrictions cannot be placed on his liberty in the interest of maintaining discipline.

Given the structured nature of the military community, with its insistence on respect for authority (see *Burns* v. *Wilson,* 346 U.S. 137, 140; *Orloff* v. *Willoughby,* 345 U.S. 83, 94), it would seem within the ambit of a commander's reasonable discretion to determine that an officer convicted of disobeying orders and sentenced to be dismissed from the Air Force should be restrained in the interest of morale and discipline. Restraints of the sort imposed in this case do not constitute punishment but would, in the language of paragraph 21d of the Manual, be deemed "necessary" to the efficiency of the military unit as a whole. There is no reason to believe that by enacting in Article 71(c) a general prohibition against "execution" of a sentence to confinement at hard labor prior to completion of appellate review, Congress implicitly intended to divest commanders of all power to impose restraint on convicted officers in the interest of military discipline.

C. RESTRAINT IN THIS CASE WAS PROPER

The preceding discussion has sought to establish that petitioner's commanding officer was authorized to impose whatever restraint he in his discretion deemed appropriate under all the circumstances pending completion of appellate review of petitioner's court-martial conviction. Under the Court's cases, acceptance of this conclusion should terminate this habeas corpus proceeding, and so the district court ruled. Because petitioner was—properly, we submit—denied relief as a threshold matter of law, the basis for his commanding officer's decision was not explored. But to illustrate the range of considerations which may legitimately be taken into account, some of which are evidently appropriate here, we respectfully refer the Court to the factors brought to the attention of the Court of Appeals for the Fourth Circuit in the *Levy* case to explain why confinement and transfer of an officer-prisoner were warranted.

In ordering Captain Levy confined to hospital quarters under guard pending completion of appellate review, his commanding officer indicated that his action was taken for the following reasons:

> * * * I have considered, among other things, the impact upon morale and discipline of military personnel stationed at Fort Jackson and throughout the Armed Services of any removal of all restraint as suggested; my obligation to insure the safety of Captain Levy as long as he remains at Fort Jackson; the fact that under

> the system of military justice established by the Uniform Code of Military Justice, sentences to confinement begin when the sentence is adjudged and are uninterrupted by parole or other lifting of the restraint, while under the nonmilitary system of criminal justice a sentence to confinement does not begin until the convicted person is incarcerated; and the very real possibility that Captain Levy's release from restriction would be construed by enlisted personnel as discriminatory since an enlisted man convicted of comparable offenses and under sentences to confinement would not be relieved of all restraint. [See Brief for the Respondents in Opposition, No. 860 O.T., 1967, pp. 5–6.]

Thereafter, the commanding officer stated in an affidavit that he also took account of (1) information received from a confidential informant that Captain Levy intended to flee to a foreign jurisdiction if released, (2) the seriousness of the offenses of which he was convicted, particularly the offense of wilful disobedience of the order of his superior, and (3) the harmful effect upon morale which his release would have. Brief in Opposition, *supra,* pp. 6–7.

Petitioner, in pressing his contention that the *sole* reason for which restraint pending appeal may be imposed is to insure the presence of the accused, relies on the fact that in the *Levy* proceedings there was reference to the possibility of flight (Pet. Br. p. 60 n. 30). It is noteworthy, however, that neither the Court of Military Appeals nor the Fourth Circuit

singled out this factor as the *sine qua non*. Instead, as the Court of Military Appeals observed, "[e]ach case must be decided on its own merits"; finding that in "the facts * * * and circumstances * * * of this case" there had been no "abuse of discretion" under Manual, para. 21d, the restraint there imposed was sustained. 17 U.S.C.M.A. at 140–141, 37 C.M.R. at 404–405.

There can be little question of the reasonableness of the commanding officer's action in the present case in ordering imposition of the relatively mild restraint of arrest to quarters pursuant to the directive set forth at A. 32–34. It surely cannot be regarded as an abuse of discretion to order an officer sentenced to dismissal and imprisonment to remain in his quarters except when engaged in routine activities. Compare the *Levy* cases.[31] If, therefore, this Court determines that it can and should reach this question, we submit that the restraint imposed on petitioner pending completion of appellate review should be held to have been lawful.

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[31] Whether petitioner's commanding officer actually considered the possibility of flight does not appear. The following facts are, however, of record: petitioner is a senior pilot qualified as an instructor for the latest military aircraft (A. 37–38); the refusal to obey an order which led to his court-martial was based upon his conscientious belief that this country's involvement in Vietnam is unjust and immoral (A. 37); since 1966 he has been seeking to resign or be released from the Air Force (A. 6, 37); at all relevant times petitioner has been stationed at Cannon Air Force Base, Clovis, New Mexico (A. 4, 17, 32–34), approximately 250 miles from the Mexican border.

CONCLUSION

If the Court determines that the case has become moot, the judgment below should be vacated and the cause remanded with directions to dismiss as moot. Otherwise, either for failure to exhaust his military remedies or for lack of substance to his contentions, the judgment denying relief to petitioner should be affirmed.

Respectfully submitted.

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338-797—69——5

APPENDIX

1. The Uniform Code of Military Justice, 10 U.S.C. 801 *et seq.*, provides in pertinent part:

ART. 9. Imposition of restraint.

(*a*) Arrest is the restraint of a person by an order, not imposed as a punishment for an offense, directing him to remain within certain specified limits. Confinement is the physical restraint of a person.

(*b*) An enlisted member may be ordered into arrest or confinement by any commissioned officer by an order, oral or written, delivered in person or through other persons subject to this chapter. A commanding officer may authorize warrant officers, petty officers, or noncommissioned officers to order enlisted members of his command or subject to his authority into arrest or confinement.

(*c*) A commissioned officer, a warrant officer, or a civilian subject to this chapter or to trial thereunder may be ordered into arrest or confinement only by a commanding officer to whose authority he is subject, by an order, oral or written, delivered in person or by another commissioned officer. The authority to order such persons into arrest or confinement may not be delegated.

(*d*) No person shall be ordered into arrest or confinement except for probable cause.

(*e*) Nothing in this article limits the authority of persons authorized to apprehend offenders to secure the custody of an alleged offender until proper authority may be notified.

ART. 10. Restraint of persons charged with offenses.

Any person subject to this chapter charged with an offense under this chapter shall be ordered into arrest or confinement, as circumstances may require; but when charged only with an offense normally tried by a summary court-martial, such person shall not ordinarily be placed in confinement. When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him.

ART. 13. Punishment prohibited before trial.

Subject to section 857 of this title (article 57), no person, while being held for trial or the result of trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances require to insure his presence, but he may be subjected to minor punishment during such period for infractions of discipline.

ART. 57. Effective date of sentences.

(*a*) Whenever a sentence of a court-martial as lawfully adjudged and approved includes a forfeiture of pay or allowances in addition to confinement not suspended, the forfeiture may apply to pay or allowances becoming due on or after the date the sentence is approved by the convening authority. No forfeiture may extend to any pay or allowances accrued before that date.

(*b*) Any period of confinement included in a sentence of a court-martial begins to run from the date the sentence is adjudged by the court-martial, but periods during which the sentence to confinement is suspended shall be excluded in computing the service of the term of confinement.

(*c*) All other sentences of courts-martial are effective on the date ordered executed.

ART. 71. Execution of sentence; suspension of sentence.

(*a*) No court-martial sentence extending to death or involving a general or flag officer shall be executed until approved by the President. He shall approve the sentence or such part, amount, or commuted form of the sentence as he sees fit, and may suspend the execution of the sentence or any part of the sentence, as approved by him, except the death sentence.

(*b*) No sentence extending to the dismissal of commissioned officer (other than a general or flag officer), cadet, or midshipman may be executed until approved by the Secretary concerned, or such Under Secretary or Assistant Secretary as may be designated by him. He shall approve the sentence or such part, amount, or commuted form of the sentence as he sees fit, and may suspend the execution of any part of the sentence as approved by him. In time of war or national emergency he may commute a sentence of dismissal to reduction to any enlisted grade. A person who is so reduced may be required to serve for the duration of the war or emergency and six months thereafter.

(*c*) No sentence which includes, unsuspended, a dishonorable or bad-conduct discharge, or confinement for one year or more, may be executed until affirmed by a board of review and, in cases reviewed by it, the Court of Military Appeals.

(*d*) All other court-martial sentences, unless suspended, may be ordered executed by the convening authority when approved by him. The convening authority may suspend the execution of any sentence, except a death sentence.

2. The Manual for Courts-Martial, United States, 1951, provides in pertinent part:

> 18. GENERAL.—*a. Definitions.—Apprehension* is the taking into custody of a person (Art. 7*a*; see 174*d*).
>
> *Arrest* is the restraint of a person by an order not imposed as punishment for an offense directing him to remain within certain specified limits (Art. 9*a*).
>
> *Confinement* is the physical restraint of a person (Art. 9*a*).
>
> *b. Basic considerations.*—(1) Any person subject to the code accused of an offense under the code shall be ordered into arrest or confinement as circumstances may require; but when accused only of an offense normally tried by a summary court-martial, such person ordinarily shall not be placed in confinement (Art. 10). The foregoing provision is not mandatory and its exercise rests within the discretion of the person vested with the power to arrest or confine. No restraint need be imposed in cases involving minor offenses. A failure to restrain does not affect the jurisdiction of the court.
>
> * * * * *
>
> 20. RESTRAINT.—*a. Status of person in arrest.* —As used in this chapter, arrest is moral restraint imposed upon a person by oral or written orders of competent authority limiting the person's personnel liberty pending disposition of charges. The restraint imposed is binding upon the person arrested, not by physical force, but by virtue of his moral and legal obligation to obey the order of arrest. He is subject to the restrictions incident to arrest prescribed in applicable regulations. A person in the status of arrest cannot be required to perform his full military duty, and if he is placed—by the authority who placed him in arrest or by superior authority—on duty inconsistent with such sta-

tus his arrest is thereby terminated. This, however, does not prevent his being required to do ordinary cleaning or policing within the specified limits of his arrest, or to take part in routine training and duties not involving the exercise of command or the bearing of arms.

b. Restriction in lieu of arrest.— An officer authorized to arrest (21*a*) may, within his discretion and without imposing arrest, restrict an accused person of his command, or subject to his authority, to specified areas of a military command with the further provision that he will participate in all military duties and activities of his organization while under such restriction. Thus an accused person may be required to remain within a specified area at specified times either because his continued presence pending investigation may be necessary or because it may be considered a wise precaution to restrict him to such an area in order that he may not again be exposed to the temptation of misconduct similar to that for which he is already under charges. Violations of such restrictions are punishable as violations of Article 134, as are breaches of punitive restrictions.

c. Confinement prior to trial.—As used in this chapter, confinement is physical restraint, imposed by either oral or written orders of competent authority, depriving a person of freedom pending the disposition of charges. Confinement will not be imposed pending trial unless deemed necessary to insure the presence of the accused at the trial or because of the seriousness of the offense charged.

d. Procedure for arresting or confining.—(1) *Preliminary inquiry into offense.*—No person shall be ordered into arrest or confinement except for probable cause (Art. 9*d*). No authority shall order a person into arrest or confinement unless he has personal knowledge of the offense or has made inquiry into it. Full inquiry is

not required, but the known or reported facts should be sufficient to furnish reasonable grounds for believing that the offense has been committed by the person to be restrained.

(2) *Procedural steps to arrest.*—An arrest is imposed by notifying the person to be arrested that he is under arrest and informing him of the limits of his arrest. The order of arrest may be either oral or written.

(3) *Procedural steps to confine.*—A person to be confined is placed under guard and taken to the place of confinement. The authority ordering the confinement will cause to be delivered to the provost marshal, commander of the guard, prison officer, or master at arms, a written statement of the name, grade, and organization of the prisoner and of the offense of which he is accused. No provost marshal, commander of the guard, prison officer, or master at arms shall refuse to receive or keep any prisoner committed to his charge by an officer of the armed forces when the committing officer furnishes a statement, signed by him, of the offense charged against the prisoner (Art. 11*a*).

(4) *Notification to accused.*—When any person subject to the code is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him (Art. 10). Concerning the time element between service of charges and trial, see Article 35. See Article 98 concerning unnecessary delay in the disposition of any case.

(5) *Report required.*—Every commander of a guard, prison officer, or master at arms to whose charge a prisoner has been committed shall, within 24 hours after such commitment, or, in the case of a commander of the guard or master at arms, as soon as he is relieved from guard, report in writing to the commanding

officer the name of such person, the offense charged against him, and the name of the person who ordered or authorized the commitment (Art. 11*b*).

e. Unlawful detention.—Any person subject to the code who, except as provided by law, apprehends, arrests, or confines any person is subject to trial by court-martial (Art. 97).

21. ARREST AND CONFINEMENT.—*a. Who may arrest or confine.*—Persons subject to the provisions of the code or to trial thereunder may be ordered into arrest or confinement as follows:

(1) *Officer, warrant officer, or civilian.*—Only a commanding officer to whose authority the individual is subject may order an officer, warrant officer, or civilian into arrest or confinement. The arrest or confinement must be effected by an order, oral or written, delivered in person or by another officer (Art. 9*c*). The authority to order such persons into arrest or confinement may not be delegated (Art. 9*c*). For this particular purpose, the term "commanding officer" shall be construed to refer to an officer commanding a post, camp, station, base, auxiliary airfield, Marine barracks, naval or Coast Guard vessel, shipyard, or other place where members of the armed forces are on duty, and the officer commanding or in charge of any other command who, under Article 24, has power to appoint a summary court-martial.

* * * * *

c. Authority of courts-martial to restrain.—A court-martial has no control over the nature of the arrest or other status of restraint of a prisoner except as regards his custody in its presence.

d. Responsibility for restraint after trial.—Upon notification from a trial counsel of the result of a trial (44*e* (2)), a commanding officer will take prompt and appropriate action with respect to the restraint of the person tried.

Such action, depending on the circumstances, may involve the immediate release of the person from any restraint, or the imposition of any necessary restraint pending final action on the case.

97. MISCELLANEOUS MATTERS.

* * * * *

c. Interruptions of execution of a sentence.— A sentence to confinement, hard labor without confinement, restriction to limits, deprivation of privileges, or suspension from rank, command, or duty is continuous until the term expires, with certain exceptions. These exceptions include the following:

When delivery under Article 14 is made to any civil authority of a person undergoing sentence of a court-martial, such delivery, if followed by conviction in a civil tribunal, shall be held to interrupt the execution of the sentence of the court-martial, and the offender after having answered to the civil authorities for his offense shall, upon the request of competent military authority, be returned to military custody for the completion of the said court-martial sentence (Art. 14*b*).

Periods during which the person undergoing such a sentence is absent without authority, or is absent under a parole which proper authority has suspended and later revoked, or is erroneously released from confinement through misrepresentation or fraud on the part of the prisoner, or is erroneously released from confinement upon his petition for a writ of habeas corpus under a court order which is later reversed by a competent tribunal, shall be excluded in computing the service of the term of the punishment.

Periods during which a sentence to confinement is suspended shall be excluded in computing the service of the term of confinement (Art. 57*b*).

3. Air Force Manual 125–2 ("Law Enforcement: Operation of Correction Facilities") provides in pertinent part:

> 6–8. *Commitment to United States Disciplinary Barracks:*
>
> a. Sentenced military personnel who are initially considered nonrestorable will be committed to the nearest United States Disciplinary Barracks from the place of trial (or the port of debarkation, if received from overseas) if they have the required amount of time remaining to serve. Prisoners must have at least six months confinement left to serve to be committed. "Time left to serve" is the time from the expected date of arrival at the disciplinary barracks to the prisoner's current minimum release date.
>
> b. Adjudged military personnel initially considered nonrestorable, whose sentences have been promulgated, will ordinarily be committed to the disciplinary barracks nearest the place of trial for confinement pending completion of appellate review (unless retention within the trial area is thought necessary), and provided they meet the "time left to serve" requirements in a, above.
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> * * * * *
>
> 6–16. *Officers and Warrant Officers Sentenced to Dismissal or Punitive Discharge.* Pending final action of the case upon appellate review, the following disposition will be made of an officer or warrant officer sentenced to dismissal or punitive discharge, after the sentence has been approved by the convening authority:
>
> a. If the trial took place within the CONUS the officer or warrant officer will ordinarily not be transferred, but separated from his present organization. In cases where the sentence as approved by the convening authority includes a period of confinement, the officer or warrant

officer is assigned to an installation having adequate facilities for the amount of the restraint the commander thinks necessary, pending final action on the case.

4. Army Regulation 633–30, Air Force Regulation 125–30 ("Apprehension and Confinement: Military Sentences to Confinement"), provides in pertinent part:

* * * * *

4. *Operation of Sentences.—a. Beginning date.* The date the sentence of a court-martial is adjudged will mark the beginning of a sentence to confinement whether or not the accused had then been placed in confinement.

5. *Operative and inoperative time.—a. Operative.* A sentence to confinement, hard labor without confinement, restriction to limits, or deprivation of privileges is continuous until the term expires and is interrupted only by inoperative time.

b. Inoperative. Inoperative time consists of any period during which a prisoner is not credited with serving his sentence. Inoperative time will include the period while absent without authority; while absent from confinement on a parole which proper authority has suspended and later revoked; while erroneously released from confinement through misrepresentation or fraud on the part of the prisoner; while absent after delivery to civil authorities, if subsequently convicted by a civil tribunal; while in a restored to duty status under a suspended sentence, the suspension of which is later vacated; or while the sentence is interrupted as prescribed in paragraph 4*b*(1). An escaped prisoner who is returned to military authority, but whose status as a prisoner is not known to such authority, and who conceals his status as a prisoner, continues to be "absent without authority" within the meaning of this regulation.

U.S. GOVERNMENT PRINTING OFFICE: 1969

SUPREME COURT OF THE UNITED STATES

No. 830.—October Term, 1968.

Captain Dale E. Noyd, Petitioner, *v.* Major General Charles R. Bond, Jr., et al.	On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[June 16, 1969.]

Mr. Justice Harlan delivered the opinion of the Court.

Petitioner is a career officer in the Air Force who has come to believe that this country's participation in the Vietnamese conflict is unjust and immoral. Having decided that he would do nothing to further the Nation's military effort in Southeast Asia, Captain Noyd refused to obey an order, issued December 5, 1967, requiring him to teach one of the junior officers at the Cannon Air Force Base, New Mexico, to fly a military airplane.[1]

[1] Before this incident took place, Captain Noyd sought to invoke the jurisdiction of the civilian federal courts in an effort to require the Air Force either to assign him to duties consistent with his beliefs or to dismiss him. The United States District Court for the District of Colorado denied relief because petitioner had not yet been court-martialed for refusing to obey orders and so had not fully exhausted his remedies within the military system. *Noyd* v. *McNamara*, 267 F. Supp. 701 (1967). The Court of Appeals for the Tenth Circuit affirmed, 378 F. 2d 538 (1967), and this Court denied certiorari, 389 U. S. 1022 (1967). The Courts of Appeals for the Second and Fifth Circuits have however subsequently decided that the exhaustion doctrine did not necessarily require a serviceman to await the military's decision to convene a court-martial before seeking relief in the civilian courts. *Hammond* v. *Lenfest*, 398 F. 2d 705 (C. A. 2d Cir. 1968); *In re Kelly*, 401 F. 2d 211 (C. A. 5th

In response, Major General Charles Bond, Jr., the Commander of the Twelfth Air Force, convened a general court-martial at the Cannon Base. On March 8, 1968, the court-martial found Noyd guilty of wilfully disobeying a lawful order; on the following day petitioner was sentenced to one year's confinement at hard labor, forfeiture of all pay and allowances, and dismissal from the Air Force. As soon as the court-martial announced its sentence, Captain Noyd was ordered confined to his quarters. The court-martial's judgment was then forwarded to General Bond for the review required by 10 U. S. C. § 864 (1964), and on May 10, 1968, the General approved the sentence, ordering that "Pending completion of appellate review, the accused will be confined in the United States Disciplinary Barracks, Fort Leavenworth, Kansas."

At this point, petitioner's attorneys undertook two courses of action. On the one hand, they appealed the merits of petitioner's conviction to the Air Force Board of Review, which is the appellate military tribunal Congress has established to oversee the administration of criminal justice in petitioner's branch of the Armed Forces. On the other hand, they sought habeas corpus relief from the civilian courts, arguing that the Uniform Code of Military Justice required that petitioner be released from confinement pending the outcome of his military appeal.

At the present time, petitioner's appeal from his conviction is still pending in the higher reaches of the military court system. While the Air Force Board of Review has now affirmed the judgment of the court-martial, the Court of Military Appeals, the highest military tribunal, has agreed to review Captain Noyd's

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Cir. 1968). Cf. *Brown* v. *McNamara*, 387 F. 2d 150 (C. A. 3d Cir. 1967). We have not found it necessary to resolve this conflict among the circuits in order to decide the narrow issue in this case.

case. Petitioner does not suggest that we may properly interfere with the orderly process of military review by considering the merits of his conviction at this juncture. Rather, we are now only asked to vindicate his asserted right to remain free from confinement while the validity of his conviction is still being litigated in the appellate military courts.

I.

Captain Noyd's effort to invoke the assistance of the civilian courts was precipitated by General Bond's order transferring petitioner to the disciplinary barracks at Fort Leavenworth. Shortly after the order was issued, and before it was carried out, petitioner sought a writ of habeas corpus from the United States District Court for the District of New Mexico, arguing that both his confinement at the Cannon Air Force Base and his proposed transfer to Fort Leavenworth were in violation of two provisions of the Uniform Code of Military Justice. First, petitioner contended that his confinement constituted an attempt to "execute" his sentence in violation of § 71 (c) of the Code, which provides:

> "No sentence which includes, unsuspended, a dishonorable or bad-conduct discharge, or confinement for one year or more, may be *executed* until affirmed by a board of review and, in cases reviewed by it, the Court of Military Appeals." 10 U. S. C. § 871 (c) (1964). (Emphasis supplied.)

Second, petitioner argued that Article 13 of the Code[2] only authorized confinement of a convicted serviceman

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[2] This provision of the Code reads:

"Art. 13. Punishment prohibited before trial.

"Subject to section 857 of this title [Article 57 of the Code], no person, while being held for trial or the result of trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or con-

pending his appeal after the military has found that restraint is necessary to prevent the serviceman's flight from the jurisdiction. Since no such finding has been made in this case, petitioner argued that the civilian court should require his complete release.

The Government, in addition to opposing Captain Noyd's claims on the merits, argued that petitioner should be required to exhaust his military remedies before seeking habeas corpus relief from the civilian courts. The District Court, however, refused to apply the exhaustion principle in the present case, finding that the military court system did not provide petitioner with an adequate remedy by which he could test the validity of his confinement, pending appeal, in an expedited manner. Turning to the merits, the District Judge granted petitioner part of the relief he requested. While the court refused to review the legality of Noyd's confinement at the Cannon Air Force Base, the court did find that petitioner's incarceration at Fort Leavenworth would constitute an "execution" of his sentence in violation of Article 71 (c), and so declared General Bond's order invalid.[3]

Both sides appealed to the Court of Appeals for the Tenth Circuit, which reversed the District Court's grant of partial relief. Relying on this Court's decision in

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finement imposed upon him be any more rigorous than the circumstances require to insure his presence, but he may be subjected to minor punishment during such period for infractions of discipline."

[3] After the District Court held that petitioner could not be lawfully transferred to Fort Leavenworth, the military significantly increased the degree of restraint that was imposed upon Captain Noyd at the Cannon Air Force Base. Petitioner was permitted to see his family only twice each week and was forbidden to leave his quarters except for narrowly limited purposes. See Letter Regarding Arrest in Quarters from Col. George R. Doerr, Joint Appendix, pp. 32–34.

Gusik v. *Schilder*, 340 U. S. 128 (1950), a unanimous panel held that the District Court could not properly grant petitioner any form of relief until he had first challenged the validity of his confinement before the appellate tribunals within the military system. The court emphasized that "the Court of Military Appeals has recently held that it possesses the power to issue a habeas corpus writ" if a serviceman could demonstrate that he was illegally restrained pending appeal, and it could perceive no justification for petitioner's failure to seek the military court's assistance. — F. 2d —, —. We granted certiorari to consider the propriety of the application of the rule of *Gusik* v. *Schilder* in the circumstances of this case. — U. S. — (1969).

II.

Shortly after the Court of Appeals announced its decision, petitioner recognized that since his sentence was scheduled to expire on December 26, 1968,[4] he might well be released from custody before this Court would have an opportunity to pass upon his claims for relief pending his appeal to the military courts. In order to avoid the possibility of mootness, petitioner promptly requested the Court of Appeals to stay its mandate and order his release pending this Court's decision on his petition for certiorari. On December 6, the Court of Appeals agreed to stay its mandate, thereby keeping the District Court's order in effect, but refused to require the military to release Captain Noyd from custody at the Cannon Air Force Base.

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[4] While petitioner's one-year sentence began to run on March 9, 1968, when it was announced by the court-martial, the Air Force awarded him sentence credits for good behavior, thereby permitting him to obtain his release from custody after a period of some nine and one-half months.

Petitioner then applied to MR. JUSTICE WHITE, Circuit Justice for the Tenth Circuit, for temporary release from all confinement pending this Court's action on his certiorari petition. When the Circuit Justice denied this application on December 18, 1968, a second motion of the same tenor was made to MR. JUSTICE DOUGLAS on the following day. Noting that the Court was then in recess and would not meet again until January 10, 1969, MR. JUSTICE DOUGLAS ordered that "petitioner . . . be placed in a non-incarcerated status" until the full Court could have an opportunity to pass on the issues raised in a considered manner. Pursuant to MR. JUSTICE DOUGLAS' order, petitioner was released from confinement on Christmas Eve, two days before his sentence was scheduled to expire.[5]

Despite MR. JUSTICE DOUGLAS' order of release, the Government now suggests that this case has become moot. It claims that under the applicable military law, a judicial order that petitioner be placed in a "non-incarcerated status" was insufficient to toll petitioner's sentence, which continued to run until it expired of its own force on December 26. The Government bases this claim upon its reading of Article 57 (b) of the Uniform Code of Military Justice:

> "Any period of confinement included in a sentence of a court-martial begins to run from the date the sentence is adjudged by the court-martial but periods during which the sentence is suspended shall be excluded in computing the service of the term of confinement." 10 U. S. C. § 857 (b) (1964).

[5] When this Court granted certiorari on January 20, 1969, we also ordered that "[t]he stay heretofore granted by MR. JUSTICE DOUGLAS shall remain in effect pending the issuance of the judgment of this Court or until further order of this Court." — U. S. — (1969).

Citing interpretive military regulations, the Government understands the statute to establish the general rule that "the date the sentence of a court-martial is adjudged will mark the beginning of a sentence to confinement *whether or not the accused had been placed in confinement.*" Apprehension and Confinement: Military Sentences to Confinement, AR 633–30; AFR 125–30. (Emphasis supplied.)

Petitioner does not disagree with the Government's understanding of the general rule, but relies on that part of the statute which expressly provides that a sentence may be tolled if it is "suspended" and the serviceman is placed on probation. Petitioner argues that since MR. JUSTICE DOUGLAS' order, and this Court's confirmance of it, had the obvious purpose to preserve the *status quo* pending the full Court's consideration of the merits of his certiorari petition, the order should be understood to have "suspended" petitioner's sentence within the meaning of the statutory exception to the general rule. In response, the Government emphasizes that MR. JUSTICE DOUGLAS' order did not expressly "suspend" petitioner's sentence and so contends that the statutory exception is not applicable in this instance.

We find it unnecessary to decide this question. For even if MR. JUSTICE DOUGLAS' order did not satisfy the statutory exception, we hold that it was sufficient to interrupt the running of petitioner's sentence. Like the Court of Military Appeals, we do not believe that Congress intended that the general rule stated in Article 57 (b) be inexorably applied in all situations which do not fall within the "suspension of sentence" exception:

> "Congress did not mention all contingencies which would prevent an accused from being credited with time served. Common sense suggests that if an

> accused escaped from confinement, his period of service would be interrupted and he would be required to make up the time at the end of the period." *United States* v. *Bryant*, 21 U. S. C. M. A. 133, 137; 30 C. M. R. 133, 137 (1961).

We think it equally clear that Article 57 (b) was not intended to give a litigious serviceman a bonus when he obtains temporary release from confinement the military was seeking to impose. Rather, the statute serves to protect a convicted serviceman who the military wishes to release from confinement before his term has run. If a serviceman's commanding officer simply releases him from confinement without "suspending" his sentence, the Code does not demand that the serviceman be given a hearing before he is reincarcerated. In contrast, the Code demands that once a sentence is "suspended," it may not be reinstated unless the accused is given a hearing, at which he is represented by counsel, in order to determine whether he has violated the conditions of his probation. 10 U. S. C. § 872 (a). Article 57 (b), then, represents Congress' decision that even though a man is temporarily set at liberty, he should be given sentence credit unless he is sure that his freedom will not be curtailed at a later date without a plenary hearing. Obviously, the statute's purpose will not be served in the present case, where Captain Noyd's liberty will only be limited once again after a full argument before the judiciary.

In recognition of this fact, the Manual for Courts-Martial has, since its promulgation in 1951, required that a serviceman not be given credit for the time during which he has obtained release from confinement in cases like the present one. The Manual, which has the force of law unless it is "contrary to or inconsistent with" the

Uniform Code Congress has enacted, 10 U. S. C. § 836 (a)(1964), provides:

> "A sentence to confinement is continuous until the term expires, with certain exceptions. These exceptions include the following:
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> . . . . . .
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> "Periods during which the person undergoing such a sentence is absent without authority . . . or is erroneously released from confinement through misrepresentation or fraud on the part of a prisoner, or is *erroneously released from confinement upon his petition for a writ of habeas corpus under a court order which is later reversed by a competent tribunal.* . . . § 97 (c), Manual for Courts-Martial (1951)." (Emphasis supplied.)

Thus, the Manual requires that a serviceman receive no sentence credit for the period he has avoided confinement if the judicial decision granting him freedom is reversed on appeal. It follows *a fortiori* that the principles established in the Manual require that Captain Noyd be denied sentence credit as well. For in the present litigation, petitioner has not convinced *any* court that he may properly be relieved from all confinement. Petitioner obtained his release from MR. JUSTICE DOUGLAS simply by showing that his chances of success on the merits were sufficiently great to warrant the grant of interlocutory relief. Surely, he is not entitled to more favorable sentencing treatment than the serviceman who has at least convinced one court that his claim to release is legally sound but whose arguments have not been upheld on appeal.

We hold that the principles of the Manual for Courts-Martial operated to interrupt the running of Captain Noyd's sentence at the time of his release on December 24, 1968, and hence that the case before us is not moot.

III.

We now turn to consider whether petitioner could properly seek his release in civilian courts without making any effort to invoke the assistance of the courts within the military system. *Gusik* v. *Schilder*, 340 U. S. 128 (1950), established the general rule that habeas corpus petitions from military prisoners should not be entertained by federal civilian courts until all available remedies within the military court system have been invoked in vain. MR. JUSTICE DOUGLAS, for a unanimous Court, explained some of the important reasons which require civilian courts to respect the integrity of the military court system that Congress has established:

> "An analogy is a petition for habeas corpus in the federal court challenging the jurisdiction of a state court. If the state procedure provides a remedy, which though available has not been exhausted, the federal courts will not interfere . . . . The policy underlying that rule is as pertinent to the collateral attack of military judgments as it is to collateral attack of judgments rendered in state courts. If an available procedure has not been employed to rectify the alleged error which the federal court is asked to correct, any interference by the federal court may be wholly needless. The procedure established to police the errors of the tribunal whose judgment is challenged may be adequate for the occasion. If it is, any friction between the federal court and the military or state tribunal is saved. . . . Such a principle of judicial administration is in no sense a suspension of the writ of habeas corpus. It is merely a deferment of resort to the writ until other corrective measures are shown to be futile." *Id.*, at 131–132.

It is true, of course, that the principles of federalism which enlighten the law of federal habeas corpus for state prisoners are not relevant to the problem before us. Nevertheless other considerations require a substantial degree of civilian deference to military tribunals. In reviewing military decisions, we must accommodate the demands of individual rights and the social order in a context which is far removed from those which we encounter in the ordinary run of civilian litigation, whether state or federal. In doing so, we must interpret a legal tradition which is radically different from that which is common in civil courts.

It is for these reasons that Congress, in the exercise of its power to "make rules for the Government and Regulation of the land and naval forces," [6] has never given this Court appellate jurisdiction to supervise the administration of criminal justice in the military. When after the Second World War, Congress became convinced of the need to assure direct civilian review over military justice, it deliberately chose to confide this power to a specialized Court of Military Appeals, so that disinterested civilian judges could gain over time a fully developed understanding of the distinctive problems and legal traditions of the Armed Forces.

Almost one year before petitioner sought habeas corpus relief from the Federal District Court sitting in New Mexico, the Court of Military Appeals had held that it would, in appropriate cases, grant the relief petitioner now demands from us. *Levy* v. *Resor,* 17 U. S. C. M. A. 135, 37 C. M. R. 399 (1967).[7] Petitioner, however, has

[6] Constitution of the United States, Art. I, § 8, cl. 14.

[7] The Government does not renew the arguments it has on occasion advanced before the Court of Military Appeals, see Brief in Support of Motion to Strike and Dismiss Petition, *United States* v. *Frischholz,* Docket No. 14,270 (1965), to the effect that the Court

made no effort to invoke the jurisdiction of the Court of Military Appeals. Nevertheless, he would have civilian courts intervene precipitously into military life without the guidance of the court to which Congress has confided primary responsibility for the supervision of military justice in this country and abroad.

Petitioner emphasizes that in the present case we are not called upon to review prematurely the merits of the court-martial proceeding itself. Instead, we are merely asked to determine the legality of petitioner's confinement while he is exercising his right of appeal to the higher military courts. It is said that there is less justification for deference to military tribunals in ancillary matters of this sort. We cannot agree. All of the reasons supporting this Court's decision in *Gusik* v. *Schilder, supra,* are applicable here. If the military courts do vindicate petitioner's claim, there will be no need for civilian judicial intervention. Needless friction will result if civilian courts throughout the land are obliged to review comparable decisions of military commanders in the first instance. Moreover, if we were to

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of Military Appeals lacks the power to grant emergency writs. In its decision in the *Frischholz* case, 16 U. S. C. M. A. 150, 36 C. M. R. 306 (1966), the Court of Military Appeals properly rejected the Government's argument, holding that the All Writs Act, 28 U. S. C. § 1651 (a) (1964), permitted it to issue all "writs necessary or appropriate in aid of [its] . . . jurisdiction." Since the All Writs Act applies by its terms to any "court established by Act of Congress," and since the Revisers of 1948 expressly noted that "The revised section extends the power to issue writs in aid of jurisiction to all courts established by Act of Congress, thus making explicit the right to exercise powers implied from the creation of such courts," we do not believe that there can be any doubt as to the power of the Court of Military Appeals to issue an emergency writ of habeas corpus in cases, like the present one, which may ultimately be reviewed by that court. A different question would, of course, arise in a case which the Court of Military Appeals is not authorized to review under the governing statutes. Cf. *United States* v. *Bevilacqua,* 18 U. S. C. M. A. 10 (1968).

reach the merits of petitioner's claim for relief pending his military appeal, we would be obliged to interpret extremely technical provisions of the Uniform Code which have no analogs in civilian jurisprudence, and which have not even been fully explored by the Court of Military Appeals itself. There seems little reason to blaze a trail on unfamiliar ground when the highest military court stands ready to consider petitioner's arguments.[8]

Petitioner contends, however, that the Court of Military Appeals cannot be expected to protect his rights in a fully effective way. His principal argument is based on the simple fact that the Court of Military Appeals sits exclusively in Washington, D. C. Thus, before a serviceman may invoke its habeas corpus jurisdiction, he must somehow obtain a lawyer willing and able to conduct a lawsuit in the Nation's capital. It is said that this practical difficulty makes it clear that the Court of Military Appeals cannot provide petitioner with adequate relief.

This argument seems to us far too sweeping to be acceptable. Individuals convicted of crime in the civil judicial system are often obliged to appeal to state courts which are far distant from the place at which they are in-

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[8] Petitioner contends that our decisions in *Toth* v. *Quarles*, 350 U. S. 11 (1955); *Reid* v. *Covert*, 354 U. S. 1 (1957); and *McElroy* v. *Guagliardo*, 361 U. S. 281 (1960), justify his position that exhaustion of military remedies is not required in this case. The cited cases held that the Constitution barred the assertion of court-martial jurisdiction over various classes of civilians connected with the military, and it is true that this Court there vindicated petitioners' claims without requiring exhaustion of military remedies. We did so, however, because we did not believe that the expertise of military courts extended to the consideration of constitutional claims of the type presented. Moreover, it appeared especially unfair to require exhaustion of military remedies when the petitioners raised substantial arguments denying the right of the military to try them at all. Neither of these factors is present in the case before us.

carcerated. Nevertheless, this fact alone has never been considered sufficient to permit a federal district court to consider a petition for habeas corpus without demanding that the prisoner exhaust all of the presently available remedies offered by the State's appellate courts. Similarly, the fact that Captain Noyd is confined far from Washington, D. C., is not enough, standing alone, to permit him to circumvent the military court system.

Noyd argues, however, that the great distance of the Court of Military Appeals is of special significance in cases like the present one, where speed is essential if relief is to be at all effective. But petitioner concedes that the Court of Military Appeals has thus far acted speedily when confronted with an application for an emergency writ,[9] and there is no reason to believe that the court would not have responded rapidly if Captain Noyd had sought its assistance.[10] Nor has petitioner ever suggested that it was impossible for him to obtain a lawyer who was willing to present an appropriate application before the Court of Military Appeals with the requisite dispatch.

Instead, petitioner simply argues that other servicemen in other situations could conceivably have great difficulty in obtaining a lawyer who was able to move quickly before the military court sitting in Washington. Moreover, it is said that the Court of Military Appeals would be inundated with applications for emergency writs if all

[9] In *Levy* v. *Resor*, *supra*, a petition for emergency relief was filed on June 20, 1967. The Court of Military Appeals promptly ordered oral argument and filed a full opinion on July 7, 1967. Both the petitioner and the Government indicate that a subsequent habeas corpus application filed by Captain Levy was ruled on by the Court of Military Appeals within five days after its submission.

[10] Consequently, we need not decide how long a serviceman must wait for a decision on his application by the Court of Military Appeals before he may petition for a writ of habeas corpus from the appropriate civilian court.

service men in petitioner's position were required to seek relief within the military system. It will be time enough, however, to consider these problems when, and if, they arise. It may be that situations like the present one are unusual, or that the Court of Military Appeals will be able to announce clear rules as to the proper treatment of convicted prisoners pending appeal, or that Congress will act to facilitate the hearing of applications for emergency writs within the military system. Since petitioner has at no time attempted to show that prompt and effective relief was unavailable from the Court of Military Appeals in his case, we hold that petitioner's failure to exhaust this remedy before seeking the assistance of the civilian courts is not excused.[11]

Accordingly, the judgment of the Court of Appeals is affirmed. In light of the substantial questions raised by petitioner, however, we think it plain that petitioner in no sense acted in bad faith when he failed to exhaust his military remedies before invoking the jurisdiction of the District Court. Consequently, we consider it appropriate for us to continue MR. JUSTICE DOUGLAS' order in effect until our mandate issues, in order to give petitioner an opportunity to present his arguments to the Court of Military Appeals. See 28 U. S. C. § 1651 (a); cf. *Phillips*

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[11] The Government suggests that petitioner should also be required to exhaust a second remedy allegedly afforded him within the military system. It is said that Captain Noyd should have requested the Air Force Board of Review to release him pending the exhaustion of his rights of appeal. The Government, however, cites no decision of a Board of Review which asserts the power to grant emergency interlocutory relief prior to the Board's consideration of a case on the merits; nor are we referred to any statute which unequivocally grants this authority. In the absence of any attempt by the Boards of Review to assert such a power, we do not believe that petitioner may properly be required to exhaust a remedy which may not exist. Cf. *Union Pacific R. R.* v. *Weld. County*, 247 U. S. 282 (1918); *Township of Hillsborough* v. *Cromwell*, 326 U. S. 620 (1946).

v. *United States*, 312 U. S. 246, 254 (Mr. Justice Frankfurter). While it is true that Captain Noyd has only two days yet to serve on his sentence, he should not be required to surrender his freedom for even this short time unless it is found that the law so requires.

It is so ordered.

MR. JUSTICE BLACK concurs in the result.

SUPREME COURT OF THE UNITED STATES

No. 830.—October Term, 1968.

Captain Dale E. Noyd, Petitioner, *v.* Major General Charles R. Bond, Jr., et al.	On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[June 16, 1969.]

Mr. Justice White, dissenting.

The petition for certiorari in this case sought a determination that petitioner was being subjected to illegal restraints pending the appeal of his court-martial conviction to the appropriate tribunals. Since his sentence had begun to run at the time it was imposed, it would have expired on December 26, 1968, unless suspended or otherwise interrupted. Hence when the petition was filed here, the most petitioner had to gain from this litigation, which does not reach the merits of his conviction, was that for the duration of his sentence—two days at the time Mr. Justice Douglas ordered his release from confinement—he was not to be subject to the restraints then being imposed on him. Surely this is a picayune issue which does not warrant decision here in any event, either alone or in conjunction with the exhaustion question. Petitioner should not have brought the custody question to the federal courts in the first place; and by the same token, if to preserve the issue he desired suspension of his sentence or its equivalent, that matter also should have been presented first to the military tribunals rather than to the District Court. I would dismiss the case as improvidently granted.